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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

THE UNITED STATES OF AMERICA, Appellant, vs. WILLIAM H. SPRAGUE and WILLIAM J. HOWEY, Appellees.	No. 606.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

Corrections of Inaccuracies and Omissions in Appellant's Statement of the Case.

1. In addition to the provisions of Article V of the Constitution and Amendment X, the provisions of the Preamble to the Constitution are directly involved, reading:

> "We The People of the United States, in order to form "a more perfect Union, establish Justice, insure domes- "tic Tranquillity, provide for the common defence, pro- "mote the general Welfare, and secure the Blessings of "Liberty to ourselves and our Posterity, do ordain and "establish this Constitution for the United States of "America".

2. Also, having direct bearing on the meaning of Article X of Amendments are the provisions of Article IX of Amendments, which reads:

> "The enumeration in the Constitution, of certain "rights, shall not be construed to deny or disparage "others retained by the people".

3. More remotely involved are the provisions of Articles XIII, XVI and XIX of Amendments (printed at length in Appendix A), which the appellant, in its brief, claims to be of the same character as Article XVIII, as giving the government added direct powers over the people. With this proposition we take distinct issue in each instance.

4. The resolution of Congress proposing the XVIII Amendment is also material and reads as follows:

> "Resolved by the Senate and House of Representatives "of the United States of America in Congress assembled "(two thirds of each House concurring therein) that the "following amendment to the Constitution be, and hereby "is proposed to the States, to become valid as a part of "the Constitution when ratified by the legislatures of "the several States as provided by the Constitution".
>
> "Section 1. After one year from the ratification of "this article the manufacture, sale or transportation of "intoxicating liquors within, the importation thereof "into, or the exportation thereof from the United States "and all territory subject to the jurisdiction thereof for "beverage purposes is hereby prohibited.
>
> "Section 2. The Congress and the several States shall "have concurrent power to enforce this article by appro- "priate legislation.
>
> "Section 3. This article shall be inoperative unless it "shall have been ratified as an amendment to the Con- "stitution by the legislatures of the several States, as "provided in the Constitution, within seven years from "the date of the submission hereof to the States by the "Congress."
>
> 40 U. S. Statutes at Large, 1050.

Particular attention is called to the express proposal "to the States", a feature of importance in which this proposal differs from every other proposal of an amendment ever submitted.

5. We point out also that the indictment charges *purely intra-State* acts, and makes no claim of breach of any Revenue Law. Neither the power to control inter-State Commerce nor the power to tax can be invoked.

The question is purely concerning the power of the Federal Government to exercise powers over intra-State possession and transportation of beer with an alcoholic content in excess of ½ of 1 per cent by volume.

6. The grounds of the motion to quash, while of the general character mentioned, were specific and detailed, and appear at length in the record.

Statement of the Questions Involved.

The argument of the Government is based upon four contentions, viz.:

(a) The matter is foreclosed from consideration by the decisions of this Court in *Hawke* v. *Smith*, 253 U. S. 221, *Dillon* v. *Gloss*, 256 U. S. 368, and the *National Prohibition Cases*, 253 U. S. 350.

(b) Article V of the Constitution gives clear and unreviewable power to Congress to adopt either method of ratification (convention or legislature) for an amendment thereto, regardless of the nature or purpose of the amendment.

(c) The language of Article V is clear on its face and permits of no interpretation other than that given to it by the Government.

(d) Since all amendments prior to the Eighteenth have been ratified by the legislative method, this is a practical construction of Article V which should be followed by this Court.

The answer of the appellees is:

(a) This Court is not foreclosed from consideration of the points raised by us.

First, because the points and the arguments we make were not presented in any of the three cases cited by the Government;

Second, because this Court is never foreclosed from reviewing its own decisions; and

Third, because if the Eighteenth Amendment is unconstitutional, and the Court is so convinced, it will so declare, regardless of any previous utterance.

(b) The true construction of Article V is dependent on the intention and purpose of those who proposed and adopted it, and on the general aim and purpose disclosed by the Instrument.

It is necessary to consider the nature of the varying powers delegated to the National Government.

The sources from which those powers are derived—

The limited powers delegated by the people.

The fact that the States could not transfer their own governing powers over the people to the National Government—they held them only to exercise.

The history of the growth of Article V.

It is obvious that unless Article V grants such power no legislature is or ever has been competent to delegate to the United States any new direct governing power over the people.

Article V was neither intended nor understood to confer any such power. It was drawn with a totally different purpose, as is clearly shown by the history of its adoption. The privilege of Congress to select a method of adoption has to conform to the nature of the amendment.

(c) The language and the history of the Tenth Amendment confirm this view of the meaning of Article V and clarify any doubts which may exist as to the construction of the language of that article, and the reservation in the Tenth Amendment reserves to the people the sole power to adopt any amendments granting

further powers over themselves or their rights and this power can be exercised only by the people assembled in conventions in their several States.

(d) No prior amendment to the Constitution presented the question involved in the Eighteenth Amendment, i. e., a grant of new powers to the Federal Government over the people and their rights. Hence, the practice followed on the first seventeen amendments has no bearing upon the question.

Never before, since the adoption of the original Constitution, has such an issue been squarely presented to this Court.

(e) The questions as to any proposed amendment are:

What is the nature of the power granted?

Is it one which legislatures are competent to grant?

Is it one reserved to *the people*, as distinguished from one reserved to the States? If it is of the former character, then adoption by State legislatures is insufficient to give validity.

Summary of the Argument.

I.

THE FIRST QUESTION IS WHETHER THE PROVISION IN ARTICLE V OF THE UNITED STATES CONSTITUTION PROVIDING FOR THE RATIFICATION OF AMENDMENTS "BY THE LEGISLATURES OF THREE-FOURTHS OF THE SEVERAL STATES, OR BY CONVENTIONS IN THREE-FOURTHS THEREOF, AS ONE OR THE OTHER MODE OF RATIFICATION MAY BE PROPOSED BY THE CONGRESS" CONFERS ARBITRARY DISCRETION UPON CONGRESS TO SELECT AGENCY OF RATIFICATION, OR WHETHER THE AGENCY TO BE SELECTED IS DEPENDENT UPON THE NATURE OF THE AMENDMENT.

II.

THE MEANING OF ANY PART OF THE CONSTITUTION IS TO BE DETERMINED BY THE PURPOSE AND INTENT OF THOSE WHO FRAMED AND ADOPTED IT, AND IN THE LIGHT OF THE INSTRUMENT AS A WHOLE.

III.

UNDER THE AMERICAN THEORY OF GOVERNMENT ULTIMATE SOVEREIGNTY RESIDES IN THE PEOPLE, AND THEY ALONE (THROUGH CONVENTIONS) WERE COMPETENT ORIGINALLY TO CREATE THE NATIONAL GOVERNMENT, AND THEY ALONE AT THAT TIME COULD HAVE CONFERRED UPON HE NATIONAL GOVERNMENT THE POWER ATTEMPTED TO BE DELEGATED BY THE EIGHTEENTH AMENDMENT.

IV.

LEGISLATURES AND CONVENTIONS WERE NOT EQUALLY REPRESENTATIVE OF THE PEOPLE. THE LEGISLATURES REPRESENTED THE STATES ALONE; THE CONVENTIONS REPRESENTED THE PEOPLE; AND INDEED FOR THE PURPOSE OF RATIFICATION *WERE* THE PEOPLE. THERE WAS A PROFOUND DISTRUST OF LEGISLATURES, A CONSISTENT ASSERTION THAT THEY WERE NOT COMPETENT TO BIND THE PEOPLE, AND AN UNWILLINGNESS TO TRUST THE PEOPLE'S RIGHTS TO THEIR ACTION.

V.

THE FACE OF THE CONVENTION RECORD ITSELF SHOWS THAT THE FINAL FORM OF ARTICLE V, PROVIDING FOR RATIFICATION OF AMENDMENTS EITHER "BY THE LEGISLATURES OF THREE-FOURTHS OF THE SEVERAL STATES, OR BY CONVENTIONS IN THREE-FOURTHS THEREOF, AS ONE OR THE OTHER MODE OF RATIFICATION MAY BE PROPOSED BY THE CONGRESS" WAS NEVER INTENDED SO TO BE READ AS TO MAKE THE LEGISLATURES COMPETENT TO GRANT TO THE UNITED STATES NEW AND DIRECT POWERS OF GOVERNMENT OVER THE PEOPLE OR THEIR RIGHTS, OR TO ENABLE CONGRESS TO CHOOSE THE LEGISLATURES AS AGENTS FOR THAT PURPOSE.

VI.

THE VIEW THAT ARTICLE V WAS NEVER INTENDED TO ENABLE LEGISLATURES TO DELEGATE TO THE UNITED STATES NEW DIRECT POWERS OF GOVERNMENT OVER THE PEOPLE IS CONFIRMED BY REFERENCE TO AND INDEED IS THE ONLY VIEW CONSISTENT WITH THE PREAMBLE AND THE GENERAL SPIRIT AND PURPOSE OF THE INSTRUMENT. AND THAT VIEW WAS PUBLICLY URGED IN ORDER TO SECURE ADOPTION OF THE CONSTITUTION.

B.

THE RESERVATION IN THE TENTH AMENDMENT ELIMINATES ANY POSSIBILITY OF POWER OF THE LEGISLATURES TO ADOPT AMENDMENTS GRANTING TO THE NATIONAL GOVERNMENT ANY ADDITIONAL POWERS OVER THE PEOPLE OR THEIR RIGHTS.

VII.

ASIDE FROM THE QUESTION WHETHER WHAT WE URGE IS THE TRUE CONSTRUCTION OF THE LANGUAGE OF THE ORIGINAL INSTRUMENT, THE HISTORIC FACT THAT THIS WAS THE INTENTION OF THOSE WHO ADOPTED IT IS IMPORTANT IN ITS BEARING ON THE ADOPTION, THE CONSTRUCTION AND THE TRUE INTERPRETATION OF THE TENTH AMENDMENT.

VIII

THE WHOLE GREAT STRUGGLE OVER THE ADOPTION O
THE CONSTITUTION (SAVE ONLY IN RHODE ISLAND AN
QUESTIONABLY, IN NEW YORK) WAS NOT OVER WHETHER
NATIONAL GOVERNMENT, A MORE PERFECT UNION, SHOU
BE CREATED, BUT OVER WHETHER *THE* CONSTITUTION
PROPOSED SHOULD BE ADOPTED WITHOUT BEING FIR
AMENDED SO AS TO PROVIDE EXPRESSLY THAT THE NE
GOVERNMENT SHOULD HAVE NO POWER TO ACQUIRE AD
TIONAL POWERS OVER THE PEOPLE OR THEIR RIGHTS B
YOND THOSE EXPRESSLY CONFERRED ON IT BY THE OR
INAL INSTRUMENT WITHOUT EXPRESS CONSENT OF TH
PEOPLE. IT WAS ONLY BY PUBLIC PROMISES THAT SU
AMENDMENTS WOULD BE MADE THAT ADOPTION BY THE FI
FTH OF THE REQUISITE NINE STATES WAS SECURED.

ALTHOUGH IT WAS GENERALLY THEN ASSUMED THAT TH
POWER OF AMENDMENT WAS LIMITED BY THE TERMS OF TH
PREAMBLE, AS URGED IN POINT VI, THE IMPORTANCE OF E
PRESS LIMITATION OF THE POWER OF AMENDMENT SO THA
NO OTHER CONSTRUCTION COULD EVER BE PLACED ON T
WAS SPECIFICALLY ASSERTED.

THE FIRST TEN AMENDMENTS WERE ADOPTED FOR TH
EXPRESS PURPOSE OF SAFEGUARDING THE PEOPLE AGAIN
IN THESE RESPECTS.

IX

THE PHRASEOLOGY OF THE TENTH AMENDMENT WAS D
LIBERATELY ALTERED BY CONGRESS BEFORE IT WAS SUBMITTED
SO AS EXPRESSLY TO PREVENT ANY POSSIBLE POWER O
LEGISLATURES TO ADOPT AMENDMENTS GRANTING AD
ADDED POWERS OVER THE PEOPLE AND THEIR RIGHT
WHICH ADDED POWERS CAN ONLY IN THE LAST OF THE FI
FTH THE RESERVATION TO THE PEOPLE DID NOT MEA
ACTING BY VOTES OF THE LEGISLATURES BUT MEANT AC
ING IN AND THROUGH CONSTITUTIONAL CONVENTIONS
CHOSEN FOR THE PURPOSE.

FOR OVER A CENTURY THIS IDEA PERMEATED THE DE
SIONS OF THIS COURT AND THE DECLARATIONS OF TH
GREATEST CONSTITUTIONAL LAWYERS.[1]

(1) *All ten of the amendments adopted were deliberately drawn*
override any and all provisions of the original instrument which mig

enlarge the freedom of the people or enable the new government to pass usual powers over the people and their individual rights, and were purposely put in general terms to avoid any direct alteration of the language of the original instrument.

(2) Carroll's alteration of the original draft of the X Amendment asserted the supreme powers of the people as distinguished from those of the States.

(3) Roger Sherman's correction pointed the X Amendment directly at the amending powers granted by the V Article.

X

THE TENTH AMENDMENT LIMITED THE FIFTH ARTICLE OF THE CONSTITUTION BY WIPING OUT ANY POSSIBLE POWER OF STATE LEGISLATURES TO ADOPT ANY AMENDMENT GRANTING ANY FURTHER POWERS THAT CAN ONLY IN THE GIFT OF THE PEOPLE AND BY RESERVING TO THE PEOPLE THEMSELVES THE SOLE POWER TO ADOPT ANY SUCH AMENDMENT, A POWER TO BE EXERCISED BY THEM ACTING IN CONVENTIONS OF THE PEOPLE ASSEMBLED IN THEIR SEVERAL STATES IN THE MANNER PROVIDED IN ARTICLE FIVE.

XI

THE PROVISIONS OF ARTICLE FIVE DID NOT DECLARE THAT THE LEGISLATURES WOULD BE AGENTS OR REPRESENTATIVES OF THE PEOPLE IN VOTING ON AMENDMENTS. THE POWER TO CALL UPON THEM TO ACT WOULD ACT IN CONVENTIONS. THE METHOD OF ADOPTION BY LEGISLATURES WAS AN ALTERNATIVE METHOD OF ADOPTION WITHOUT REFERRING THE AMENDMENT TO THE PEOPLE. THUS WAS THE UNDERSTANDING AT THE TIME AND WAS EXPRESSLY DECLARED IN CONNECTION WITH THE RESERVATION TO THE PEOPLE MADE BY THE TENTH AMENDMENT.

XII

IN THE CASE OF THE EIGHTEENTH AMENDMENT ESPECIALLY THE LEGISLATURES COULD NOT CLAIM TO ACT IN BEHALF OF OR AS REPRESENTATIVES OF THE PEOPLE BECAUSE IT WAS EXPRESSLY PROPOSED TO THE STATES

XIII

NO OTHER AMENDMENT TO THE CONSTITUTION HAS INVOLVED THE QUESTION HERE PRESENTED NOR WILL THE VALIDITY OF ANY OF THE OTHER AMENDMENTS BE IMPAIRED BY AN AFFIRMANCE IN THIS CASE.

XIV

THE QUESTION OF POWER NOW PRESENTED HAS NOT BEEN ADJUDGED OR CONSIDERED BY THIS COURT. IT HAS BEEN PASSED SUB SILENTIO IN ALL PREVIOUS CASES DEALING WITH THE EIGHTEENTH AMENDMENT AND THEY DO NOT CONCLUDE THE QUESTION.

XV

OF THE OPINION OF THE COURT BELOW

XVI

THE CONTENTIONS HERE PRESENT ARE OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE. THE EIGHTEENTH AMENDMENT IS MERELY THE INSTRUMENT THAT PRESENTS THE BASIC QUESTION OF THE CONTROL OF THE LIBERTIES OF THE PEOPLE AND THE POWERS INTRINSICALLY RESERVED TO THEM BY THE TENTH AMENDMENT.

CONCLUSION

AS THE EIGHTEENTH AMENDMENT HAS NEVER BEEN ADOPTED BY THE PEOPLE TO WHOM ALONE WAS RESERVED THE POWER TO GRANT ANY SUCH ADDITIONAL POWERS OVER THEMSELVES OR THEIR RIGHTS TO THE NATIONAL GOVERNMENT, CONGRESS HAD NO POWER TO ENACT OR ENFORCE THE STATUTORY PROVISIONS UNDER WHICH THIS INDICTMENT IS FRAMED. THE PROVISIONS OF THE ACT ON WHICH THE INDICTMENT IS PREDICATED ARE THEREFORE UNCONSTITUTIONAL. CONSEQUENTLY NO CRIME AGAINST THE UNITED STATES IS CHARGED BY THE INDICTMENT.

THE JUDGMENT QUASHING THE INDICTMENT MUST, THEREFORE, BE AFFIRMED.

POINT I.

The first question in this case is whether the provision in Article V of the United States Constitution, providing for the ratification of amendments "by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress" confers arbitrary discretion upon Congress to select the agency of ratification, or whether the agency to be selected is dependent upon the nature of the amendment.

The following propositions are, we think, not arguable, nor are they questioned; we state them merely to clarify the approach to the real question. If, however, any attack is made upon the validity of these propositions, ample support for them will be found in the succeeding points of the brief.

(1) The United States is a government of delegated and enumerated powers limited to those specifically conferred upon it by the Constitution and those necessarily implied. No power could exist in the National Government to prohibit or regulate the manufacture or sale or the *intrastate* transportation of intoxicating liquors except by virtue of an amendment to the Constitution of the United States duly proposed and ratified, conferring this new and additional power. The Eighteenth Amendment is a purported grant of such new and additional power.

(2) The Eighteenth Amendment is the first instance, since the adoption of the Constitution in 1789, in which an attempt has been made to confer upon the United States new and additional direct powers of government and control over the people themselves or over their rights. As our argument de-

velops it will be realized that the novel character of the amendment is of fundamental importance. Such a grant of additional direct powers of government over the people is to be distinguished from changes in the framework of government, from surrender or limitations of powers of the States as such, or from new guarantees of protection and benefit to the people against discrimination or usurpation by the National or State Governments. We shall later argue that the Nineteenth Amendment is not within these latter classes.

[illegible] At the time the Constitution was adopted such a grant of power as that purported to be given by the Eighteenth Amendment could only have been conferred upon the United States by consent of the people themselves in convention assembled. It could not have been granted by the legislatures which were regarded as representatives of the States in their corporate capacities and not of the people thereof. Such a power can be granted today by the legislatures if it emerge only from the people themselves in conventions assembled. [illegible] Congress is authorized to propose amendments to the Constitution, whether from the people to the legislatures or to make such grants of direct powers over them to the National Government.

Accordingly, the first question presented in this appeal is whether Article V [illegible] gives to Congress a discretion in Congress to select legislatures or conventions as the agencies of ratification, or whether it is the meaning of this clause that Congress must provide for ratification by legislatures in relation to certain classes of amendments and ratifications by conventions as to other classes of amendments, depending upon the nature and character thereof.

POINT II.

The meaning of any part of the Constitution is to be determined by the purpose and intent of those who framed and adopted it and in the light of the instrument as a whole.

The real intent of the provisions of the Constitution, when ascertained, controls over the literal sense of the words and the terms employed

Juilliard v. Greenman, 110 U. S. 421, 439;
Legal Tender Cases, 12 Wall. 457;
Gibbons v. Ogden, 9 Wheat. 1, 188;
Prigg v. Pennsylvania, 16 Peters 539, 610, 611;
Rhode Island v. Mass., 12 Pet. 657, 721.

This Court will readily recall the numerous instances in which it has disregarded the literal wording of the Constitution because sufficient proof was presented to it that the literal language was inconsistent with the purpose and intent of those who framed and adopted it.

Article III, Section 2, declares that

> "the judicial Power shall extend . . . to all Cases affecting Ambassadors, other public ministers and Consuls."

> "In all cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have original jurisdiction."

The constitutional provision was supplemented by provisions in the Judicial Code, Section 256 giving exclusive jurisdiction to the federal courts of all suits and proceedings against "Ambassadors or other public ministers, or their domestics or domestic servants, or against Consuls and Vice Consuls". This language can hardly be more clear and less ambiguous, yet in *Ponoroff v. Taylor*, 280 U. S. 379, it was

held that state courts were not excluded from jurisdiction over a suit against a Vice Consul and citizen of a foreign country for divorce and alimony. Mr. Justice Holmes said (p. 383):

> "The language so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it was reasonable to suppose that the language was used. . . . If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes." (Italics ours.)

Article I, Section 10, of the Constitution provides that

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."

Could there be language more clear than this? Yet in Virginia v. Tennessee, 148 U. S. 503, which was a case involving the validity and effect of an agreement between those two States for the location of their boundary line, it was held by this Court that the prohibition was not to be literally construed and did not invalidate the compact made.

> "The terms agreement or compact taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects, to those to which the United States can have no possible objection, or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control." (pp. 517-518.)

Then the Court illustrates instances in which the United States would not be concerned with such compacts and continues:

"If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

We can only reply by looking at the object of the constitutional provision, and construing the terms 'agreement' and 'compact' by reference to it." (p. 519) (Italics ours.)

Article I, Section 8, declares that "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises". The only limitations in the Constitution upon this power are that direct taxes shall be apportioned among the several States according to their respective numbers (modified, of course, by the Sixteenth Amendment), and that duties, imposts and excises shall be uniform throughout the United States. Nevertheless, in *The Collector* v. *Day*, 11 Wall. 113, this Court held a general income tax invalid when it was attempted to be applied to the salary of a State judge. This Court said:

"It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." (p. 127.)

Article II, Section 2, of the Constitution declares that "The President • • • shall have Power to grant Reprieves and Pardons for offences against the United States, except in cases of Impeachment". In *Ex parte Grossman*, 267 U. S. 87, the question was whether this power extended to a criminal contempt against a federal court. The Court said:

> "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary." (pp. 108-109.)

The Court quoted to the same effect from *Ex parte Wells*, 18 How. 307, 311.

Then the Court went into the history of the consideration by the Convention by which this phraseology was formulated, and said:

> "We have given the history of the clause to show that the words 'for offences against the United States' were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the States. *It can not be supposed that the Committee on Revision by adding these words or the Convention by accepting them, intended sub silentio* to narrow the scope of a pardon from one at common law or to confer any different power in this regard on our Executive from that which the members of the Convention had seen exercised before the Revolution." (p. 113.) (Italics ours.)

Dillon v. Gloss, 256 U. S. 368, was a case which involved the construction of the Fifth Article of the Constitution itself and the validity of the Eighteenth Amendment. In proposing the amendment Congress had declared that it should be inoperative unless ratified within seven years. It was asserted that nothing in the Constitution conferred the power upon Congress thus to limit the time within which ratification might be made. (p. 371.)

> "It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What, then, is the reasonable inference or im-

plication? Is it that ratification may be had at any time, as within a few years, a century, or even a longer period; or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the Federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

* * * * * * *

"*That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed*" (Italics ours).

See also:

Ex parte Yarbrough, 110 U. S. 651, 658;

South Carolina v. United States, 199 U. S. 437, 451.

We believe that the provision in Article V for ratification by legislatures or conventions "as the one or the other Mode of Ratification may be proposed by the Congress" is no more to be construed literally than these other provisions of the Constitution upon which the Court has had occasion to pass, if it appears clearly that such a literal construction is inconsistent with the declarations, purpose and intention of those who framed and adopted the Constitution, and with the fundamental theory and structure of our government.

Nor can the true construction of the powers conferred by the terms of Article V be reached by considering it separate and apart from the general aim and purpose of the instrument declared in the Preamble.

POINT III.

Under the American theory of government ultimate sovereignty resides in the people, and they alone (through conventions) were competent originally to create the National Government, and they alone at that time could have granted to the National Government the power attempted to be delegated by the Eighteenth Amendment.

It is a fundamental concept of our system of government that all sovereignty ultimately resides in the people themselves and that the United States in its existing form could have been created only by consent of the people and not by action of the States in their corporate capacities. Nor is it only the National Government which draws its existence from the people; the ultimate sovereignty in every State lies also in the people.

> *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 402-405 (See also Argument of Pinckney, ibid. 377);
> *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324, 325;
> *Barron* v. *Baltimore*, 7 Peters 242, 247, 249-250;
> *Keith* v. *Clark*, 97 U. S. 454, 475-476.

The following quotation from Chief Justice Marshall's opinion in *McCulloch* v. *Maryland* sums up the factors which are particularly pertinent in this case (pp. 402-405):

> "In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

"It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. *They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention.* It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

"*From these Conventions the constitution derives its whole authority.* The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

"It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted

its government does not remain to be settled in this country. Much more might the legitimacy of the general government be disputed had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, in order to form a more perfect union, it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

"The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." (Italics ours.)

We accept the following points in the statement of the Chief Justice:

(1) The Constitution and the National Government were not the creations of the States, but of the people themselves.

(2) The people acted through conventions; the conventions in the several States were the people.

(3) The government so formed was a government, not of the people of the various States, but of the people of the Nation as a whole.

(4) The assent of the States in their corporate capacities to the Constitution and the National Government was implied in their submission of the Constitution to the people in their respective State conventions.

(5) Though the people of the respective States had already created State sovereignties, they had the power to resume and modify the powers delegated to those governments.

(6) The powers which the people had delegated to the States were to be exercised by the States, themselves, and

not by a distinct and independent sovereignty created by themselves. The States were incompetent to transfer their own powers to another government.

(7) The States, as such, could create a league such as the Confederation, but they could not create a new Nation "possessing great and sovereign powers, and acting directly on the people." Such a government must be created and such powers must be derived directly from the people.

Here is firsthand testimony as to the political philosophy and implications underlying our constitutional system. Were there any question of its accuracy, every statement is amply confirmed by the debates in the constitutional convention, in the State conventions for ratification and the writings of the publicists of that period.

In the Constitutional Convention:

5 Elliot's Debates, 130, 352-356 (App. B);
5 Elliot's Debates, 352-356;
1 Farrand, 122-123, 126-127 (App. C);

Publicists:

The Federalist:
XXXIX,
XLIII,
XLIX

State Conventions:

2 Elliot, 457-458; (App. B);
4 Elliot, 328; (App. C).

First Congress:

3 Farrand, 371; (App. C).

The application of these principles to the present case is of fundamental importance. It shows that such powers as those purported to be conferred upon the United States by

the Eighteenth Amendment could, in the original Constitution, have been granted only by the people themselves acting through conventions, and that the States and their legislatures would not have been competent to make such a grant.

It will tend to clarity of thought if we stop for a moment and apply the principles laid down by Chief Justice Marshall to the practical situation which existed in 1787, when the Constitution was in the process of formation. Precisely to what extent was it necessary to go to the people for the creation of the new government? What elements of power in the new government lay solely within the gift of the people themselves? What relations had these principles to further surrenders and delegations of power, to be made by future amendments. (The same analyses will be of aid, when, later, we analyze the nineteen amendments and show that, if our construction of Article V is sound, only the Eighteenth Amendment required resort to the people in conventions.)

There were thirteen sovereign States, each independent and supreme within its own territorial jurisdiction. They had entered into a Confederation, and created machinery for the operation of that Confederation, such as a Congress and the power of that Congress to levy requisitions on each State for the support of the central government. The Confederation was not a Nation; it was a League. The document by which it was created was not a Constitution but a Treaty.

When it was desired to form a true Nation, what grants or provisions had to be included for the creation of that Nation, and whence were these elements to be derived? We think it evident that there were five separate and distinctive groups of provisions, of differing character, and derivable from two different sources.

(1) First, there must be a *framework* of the new government, a *machinery* through which the powers to be given

to it would function. Its creation was within the power of the States, and of the legislatures as their representatives. It was precisely what they had done in the formation of the Confederation.

(2) Then it was necessary to surrender to the new government certain rights which belonged to the States, as such. These are illustrated by the provisions of Article IV of the Articles of Confederation the agreement that the inhabitants of each State should be entitled to all the privileges and immunities of citizens of the several States, the right to free passage, and the privilege of trade and commerce, the freedom of the National Government from taxation by the States, extradition of criminals, full faith and credit to be given by each State to the statutes and judicial proceedings of others.

(3) But while the States and legislatures were competent in the two aspects just mentioned, the new government would still have been only a Federation or League of States, bound together by a Treaty, any member of which would have had the power to denounce the treaty or any part thereof and secede from the alliance. In order that it might become an indissoluble Union, and a Nation, it was necessary that the assent of the *people* of the states be secured. They alone were competent to transform the Federation into a Nation, and they alone, in their several States, had the power to bind future legislatures so that they could not undo the bond.

This had been a fundamental weakness of the Confederation. The States had entered into solemn obligations with each other, but various States and legislatures had failed or refused to recognize those obligations. Legislative acts subsequent to the Act of Confederation were of greater force than the Act of Confederation itself. So long as the alliance was that of States and of States only, this situation would continue. In order that there might be created a Nation and a Union, power must be derived from those who held power over both States and legislatures—the people.

But it is essential to bear in mind (when we come to Point XIII to test the character of the nineteen amendments) that this action of the people, *once taken*, was complete and final, an indissoluble nation was created. Thereafter the States and legislatures would themselves be competent to ratify amendments which affected merely the framework or machinery of government (and not its powers), or surrendered the rights of the *States* as such.

(4) In addition to these provisions for the framework of the government and the delegation of these powers, it was essential to the successful operation of the new National government that it should have power to operate directly upon the people themselves and upon their rights and property. The Confederation did not possess this power. The legislatures were not competent to grant to a new Nation the right, for example, to levy taxes directly upon their inhabitants. The same lack of power ran through the entire Confederation.

To procure these direct powers over the people it was necessary to go to the people themselves.

The purported grant of power contained in the Eighteenth Amendment is of this class. *To confer this power upon the United States when the Nation was formed, it would have been essential to procure the direct consent of the people through their conventions.*

(5) **There is a fifth class of provisions made necessary by reason of this grant of direct governmental power over the people—those which safeguard the people from usurpation and tyranny by the new National Government after the grant to it of direct power over them. So long as there existed merely a federation or league, the confederation could not invade the States and oppress the inhabitants. But as soon as the people gave to the new Government power over themselves, then it became subject to abuse, and for that reason they demanded the equivalent of the Bills of Rights which they had placed in their State constitutions.**

The people were not satisfied with the few safeguards contained in the original instrument. They believed them inade-

quate. As a result of this fear the first ten amendments were demanded and adopted.

Provisions of this kind could be adopted by legislatures. There were in them no grants of power over the people.

It must be borne in mind that even after the Constitution was adopted, the new government was still one of limited enumerated powers. If further grants of power or future changes were desired, who was competent to make them?

It must be evident that, unless there was express provision to the contrary, the *residuum* of powers remained with those who originally possessed them, States or the people, as the case may be. If no provision for amendment were made in the Constitution conferring upon the States or legislatures the future right to grant powers over the people, *then for new powers over the people the National Government must resort anew to the people themselves*. This, we think cannot be questioned.

The thought of the fathers was the same thought which this Court expressed through Justice Brewer in *Kansas v. Colorado*:

> "All powers of a National character which are not delegated to the National Government by the Constitution are reserved to the people of the United States" (206 U. S. 46, 90).

We come, then, to the inquiry whether the framers of the Constitution, and the State Conventions which adopted it, intended, by the provision in Article V quoted at the beginning of this point, to transfer to the legislatures the power thereafter to delegate to the United States new direct governmental powers over the people and their rights, though until then the legislatures were incompetent in this field, and though it was precisely to this end that every safeguard and protection for the people was sought.

POINT IV.

Legislatures and conventions were not equally representative of the people. The legislatures represented the States alone; the conventions represented the people, and indeed for the purpose of ratification were the people. There was a profound distrust of legislatures, a consistent assertion that they were not competent to bind the people, and an unwillingness to trust the people's rights to their action.

[illegible]

continuous and consistent denial of competence in the legislatures to speak for, or bind, the people in the grant of powers to the new National Government. Chief Justice Hughes, in an address made to the American Bar Association and their foreign guests, at Chicago in 1930, stated the historical fact as follows:

> "The founders sought to establish representative government, but they had a profound distrust of legislatures." (New York State Bar Association Bulletin, October, 1930, p. 433).

We regret that the limitations of time have made it impossible to prepare a complete index of the expressions of this sentiment in the Convention. They will be found throughout the whole body of the debates. Not a subject

...pose where the participation of state legislatures was proposed but that some delegate voiced the universal distrust. We quote illustrative passages, but we must reiterate and emphasize the fact that the total volume of such expressions is overwhelming in its significance.

We are indebted to the learned Court below for a quotation from Jameson, "The Constitutional Convention", pages ...

... The framing of this constitution may be summed up ... as an attempt to fit an adaptation to the exigencies of ... government, in the United States, ... principles of ... as derived from our ... • • •

... the most oppressive, experienced by them as ... of the House of Parliament, a popular ... in fact, representing the ... of the whole empire, might not have given us ... these expressions, especially of ... the power of ordinary legislation ... and that the enactments are exposed by the *English* ... to annulment for violating the organic law?

... *the apprehension, which existed at the time of our separation from the mother country, of the attempts of the Revolution to seek some other depository of the latter power. This they found in the governments in force in the several colonies, invested, in point of structure and organization, after the Revolutionary Conventions, with all the powers of sovereignty, but clothed with the single function of making and altering their municipal laws, and of conforming to the ordinary course of legislation.*"

Oliver Ellsworth, later Chief Justice of the United States, voiced the universal attitude towards legislatures.

> "It proves the honesty and patriotism of the gentlemen who composed the general Convention, that they chose to submit their system to the people *rather than the legislatures, whose decisions are often influenced by men in the lowest departments of government, who have possibly political views of their own to promote, least*

they should be injured by its operation. I would not wish to exclude from a State Convention those gentlemen who compose the higher branches of the assemblies in the several states, but choose to see them stand on an even floor with their brethren, where the artifice of a small number cannot negative a vast majority of the people.

"*This danger was foreseen by the Federal Convention*, and they have wisely avoided it by appealing directly to the people" (Ford, Essays on the Constitution, 139-140; Letters of a Landholder, 1).

Distrust of the legislative branches of the State governments and the feeling that they were not representative of the people pervaded the entire constitutional debate. The representatives in Congress ought to be chosen by the people, so that they should be truly representative.

From the debate in the Federal Convention:

"Col. Mason. Under the existing Confederacy, *Congress* represent the *states, and not* the *people of the states; their acts operate on the states; not on the individuals.* The case will be changed in the new plan of government. *The people will be represented:* they ought therefore to choose the representatives. The requisites in actual representation are, that the representatives should sympathize with their constituents; should think as they think, and feel as they feel; and that for these purposes they should be residents among them. Much, he said, had been alleged against democratic elections. He admitted that much might be said; but it was to be considered that no government was free from imperfections and evils; and that improper elections, in many instances, were inseparable from republican governments. But compare these with the *advantage of this form, in favor of the rights of the people—in favor of human nature.* He was persuaded there was a better chance for proper elections by the people, if divided into large districts, than by the state legislatures. *Paper money had been issued by the latter, when the former were against it. Was it to be supposed that the state legislatures, then, would not send to the national legislature patrons of such projects, if the choice depended on them?*" (5 Ell. Deb. 161).

"Mr. Dickinson considered it essential that one branch of the legislature should be drawn immediately from the people, and expedient that the other should be chosen by the legislatures of the states" (5 Ell. Deb. 163).

"Mr. Pierce was for an election by the people as to the first branch, and by the states as to the second branch; by *which means the citizens of the states would be represented both individually and collectively*" (5 Ell. Deb. 163).

So, in debating the method of choosing the executive, it was said:

"The existing authorities in the states are the legislative, executive, and judiciary. The appointment of the national executive by the first was objectionable in many points of view, some of which had been already mentioned. He would mention one which of itself would decide his opinion. *The legislatures of the states had betrayed a strong propensity to a variety of pernicious measures.* One object of the national legislature was to control this propensity. One object of the national executive, so far as it would have a negative on the laws, *was to control the national legislature, so far as it might be infected with a similar propensity*" (5 Elliot's Debates, 364).

The quotation given from Jameson above contains a key to the problem. The entire legislative history of England had been a warning to the peoples of the new States against a general grant of power to their legislatures. Their distrust was intensified by their own experience during the thirty years preceding the adoption of the Constitution. Distrust of Parliament had occasioned the Revolutionary War, and the colonists were keenly alive to the methods by which the Crown controlled members of Parliament when it could not control the views of the people.

And the same experience had been repeated with the colonial legislatures. These, except in Connecticut and Rhode Island, had sided with the Crown in the Revolution. This distrust of their own colonial legislatures, growing out of their attitude, led to the immediate adoption of new state

constitutions in the majority of the States. These new constitutions departed entirely from the English theory of a supreme parliament, declared the people to be sovereign and the legislatures their servants, and restricted the powers of the legislatures so that they might never have the power to interfere with the rights of freemen.

In the face of this history and evidence, proponents of the Eighteenth Amendment must sustain the burden of proof that members of the conventions intended to grant away to the legislatures for all future time, through the power of amendment of the United States Constitution, every right and safeguard which the people had established and every power which they had carefully reserved to themselves.

So the discussion is replete with evidence that when action of the *people* was required, it was to be taken through conventions. For the purpose of constitutional action the legislatures were states; Conventions were the people.

Marshall, C. J. so declared in the quotaton which we have already given from *McCulloch* v. *Maryland*, *supra*, pp. 18-20. He spoke with personal knowledge of the constitutional philosophy.

So Jameson and Ellsworth; quoted earlier in this Point.

So throughout the debates on the mode of ratification excerpts from which are given in appendix B, See especially Ellsworth's motion to refer to the legislatures for ratification 5 Elliot's Debates, 352-356 (*infra*, *pp.* 113-119).

So Madison, both in the debates (Appendix C) and in the Federalist (see especially XLIII Appendix C).

In all these references it will be observed that ratification by the legislatures was not sufficient, *because they represented the states;* ratification by conventions was requred because ratification *by the people* was essential, *and conventions were the people.*

In this respect, as we pointed out in our analysis of his opinion, the learned judge below was in error. He treated legislatures and conventions as equally representative of the people, failing to observe that in Constitutional action, this is not true, as his own quotation from Jameson shows.

POINT V.

The face of the convention record itself shows that the final form of Article V, providing for ratification of amendments either "by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress", was never intended so to be read as to make the legislatures competent to grant to the United States new and direct powers of government over the people or their rights, or to enable Congress to choose the legislatures as agents for that purpose.

How did Article V receive its final form? What is there in the debates and the sequence of its development which throws any light upon its meaning? Did the delegates consider that unless there was included the provision for ratification of amendments by legislatures, those legislatures had no power to delegate new direct governmental powers over the people to the United States? And if they did consider this, did they intentionally confer that new power upon the legislatures? Or was this clause in Article V an insertion made as part of a revision, with an entirely different purpose? And if this be the fact, does the clause necessarily confer such a new and extraordinary power upon the legislatures, or is there another more reasonable reading of the clause?

In Point II, we gave consideration to those cases wherein this court has declined to give a literal interpretation to constitutional provisions. We quoted the decisions in which this court, in dealing with other important provisions of the Constitution, has referred to the debates and surrounding circumstances to ascertain the true meaning of the provision. We shall follow the same course here.

To ascertain the true significance of Article V the debates on the provision for amendment must read in their entirety and, furthermore, they *must be read in connection with the debates on the provision for ratification of the Constitution itself* because these two discussions ran side by side throughout the convention, and the principles which control one are very pertinent to the meaning of the other.

We have printed the debates on these provisions in their chronological sequence in Appendix B. Their importance can only be appreciated by reading them as a whole. For us to attempt to summarize them would destroy their significance. Accordingly, we shall call the court's attention to the salient features to be observed and refer the court to the Appendix.

We have already observed (Point III) that the States were competent to surrender certain classes of powers to the new government, but for those which directly affected the people and their rights recourse must be had to the people in convention. The necessity of recourse to the people was emphasized again and again in the debates, and motions to refer the Constitution to the legislatures for ratification were overwhelmingly defeated. *Obviously, amendments must come from the same source as original powers unless the convention deliberately included a provision intended to accomplish a different result.*

Article V finds its genesis in Resolution 13 of the Randolph Plan. That Resolution was confined to a declaration

> "that provision ought to be made for the amendment of
> "the Articles of Union whensoever it shall seem neces-
> "sary"

but the Congressional assent thereto should not be required.

No procedural requirements and no source of the amending power is mentioned. But the Randolph Plan is predicated on the principle that the new government must go to the people for a delegation of power if it is to be successful, and, accordingly, that the Constitution must be ratified by conventions of the people.

The Randolph resolution as to amendment is to be contrasted with that in the (supposed) Pinckney Plan, which read:

> "ART. XVI.—If two-thirds of the legislatures of the "states apply for the same the legislatures of the United "States shall call a convention for the purpose of amend-"ing the Constitution; or, should Congress, with the con-"sent of two-thirds of each House, propose to the states "amendments to the same, the agreement of two-thirds "of the legislatures of the states shall be sufficient to "make the said amendments parts of the Constitution."

This is significant because this Article XVI of the Pinckney Plan appears never again to have been considered in connection with the final Article V of the Constitution. Despite the similarity to the clause in Article V with which we are now concerned, the Pinckney draft definitely was not the source of that clause.

The earlier debates on the Randolph resolutions are significant in their declarations upon the necessity of going to the people for approval of the Constitution. But we shall not comment in detail upon those debates preceding July 23d. On that day the resolution for ratification by the people was taken up.

> "Mr. ELLSWORTH moved that it be referred to the legis-"latures of the States for ratification. Mr. Patterson sec-"onded the motion."

Issue was immediately joined upon this proposed change from ratification by conventions to ratification by the states. The debate which ensued is of vital importance. It commences:

> "Col. MASON considered a reference of the plan to the "authority of the people as one of the most important and "essential of the resolutions. The legislatures have no "power to ratify it. They are the mere creatures of the "state constitutions, and cannot be greater than their "creators. And he knew of no power in any of the con-

"stitutions—he knew there was no power in some of them "that could be competent to this object. Whither, then, "must we resort? To the people, with whom all power "remains that has not been given up in the constitutions "derived from them? It was of great moment, he ob- "served, that this doctrine should be cherished as the "basis of free government."

Mr. Gerry took the opposite view, and while his contribution to this particular debate is of no great importance, it is vital because of the proposal which he subsequently made that all amendments should be submitted to legislatures and not to conventions for ratification.

Mr. Madison's position is of importance, too, because it was he who finally proposed the system for amendment which is incorporated in Article V.

"Mr. MADISON thought it clear that the legislatures "were incompetent to the proposed changes. These "changes would make essential inroads on the state con- "stitutions; and it would be a novel and dangerous doc- "trine that a legislature could change the constitution "under which it held its existence. There might indeed "be some constitutions within the Union which had given "a power to the legislature to concur in alterations of "the federal compact. But there were certainly some "which had not; and, in the case of these, a ratification "must of necessity be obtained from the people. He "considered the difference between a system founded on "the legislatures only, and one founded on the people, to "be the true difference between a *league* or *treaty* and a *"constitution."*

The expressions quoted are typical of the entire debate.

The motion to refer the plan to legislatures for ratification was lost seven to three.

The original plan to refer the Constitution to conventions was adopted nine to one.

Following this, a Committee of Detail reported a draft based on the resolutions as adopted. It contained these clauses:

"*We, the people* of the states of New Hampshire, "Massachusetts, Rhode Island and Providence Planta-"tions, Connecticut, New York, New Jersey, Pennsyl-"vania, Delaware, Maryland, Virginia, North Carolina, "South Carolina, and Georgia, do ordain, declare and "establish the following Constitution for the govern-"ment of ourselves and our posterity:" (pp. 376-377).

"Art. XIX.—On the application of the legislatures "of two-thirds of the states in the Union, for an amend-"ment of this Constitution, the legislature of the United "States shall call *a convention for that purpose*" (p. 381).

"Art. XXI.—The ratification of the *conventions* of "* * * states shall be sufficient for organizing this Con-"stitution" (p. 381).

"Art. XXII.—This Constitution shall be laid before "the United States in Congress assembled, for their "approbation; and it is the opinion of this Convention, "that it should be afterwards submitted to *a convention* "chosen in each state, under the recommendation of its "legislature, in order to receive the ratification of such "convention" (p. 381).

Article XIX, proposing amendments by a convention, was taken up on August 30th. It was agreed to *nem. com.*

At this stage then the convention was definitely committed to amendments solely by conventions.

Then there followed debates on Articles XXI, XXII and XXIII, all of which involved ratification of the Constitution itself by conventions. The debate is significant for its confirmation of the views in the earlier discussion that ratification by conventions was essential and for the defeat of Gouverneur Morris's motion to omit the words "conventions of the", so that the States might pursue their own mode of ratification.

Up to this point then both amendments and the original document were to go to conventions of the people.

On September 10th, the entire instrument having been debated,

"Mr. GERRY moved to reconsider Article 19, viz.:

"On the application of the legislatures of two-
"thirds of the states in the Union, for an amendment
"of this Constitution, the legislature of the United
"States shall call a convention for that purpose."

As the outcome of this motion for reconsideration, Article V received its present form. The record, therefore, may be considered in some detail.

The following objections were advanced to Article XIX in its then form:

Gerry: The Constitution is to be paramount to the States' Constitutions. Two-thirds of the States may obtain a convention, a majority of which could bind the entire nation.

Hamilton: The method of amendment was not sufficiently easy: Congress ought to have the power to propose changes by a two-thirds vote of each house.

"There could be no danger in giving this power, as the
"people so finally decided in the case."

Madison: The clause "called a convention for the purpose" is too vague, "because it does not provide how the convention is to be formed nor by what rule it is to decide nor what are the force of its acts".

Sherman: He proposed an addition to the article, so that Congress might propose

"amendments to the several states for their approbation;
"but no amendments shall be binding until consented to
"by the several states."

This was immediately amended to permit the consent of three-fourths of the States. It must be understood that what Sherman was emphasizing here was unanimity of consent to amendments, and it was on that that attention was directed. We shall find him later attempting to remove the three-fourths provision both as to legislatures and conventions; attempting to add a proviso that no State should ever be

affected in its internal police or deprived of equal suffrage in the Senate, without its consent; and on failure in these two attempts he moved to strike out Article V. entirely.

With the record in this condition Madison proposed an entire substitute. It reads:

> "The legislature of the United States, whenever two-
> "thirds of both Houses shall deem necessary, or on
> "the application of two-thirds of the legislatures of
> "the several states, shall propose amendments to this
> "Constitution, which shall be valid, to all intents and
> "purposes, as part thereof, when the same shall have
> "been ratified by three-fourths, at least, of the legis-
> "latures of the several states, or by conventions in
> "three-fourths thereof, as one or the other mode of
> "ratification may be proposed by the legislature of
> "the United States."

It was seconded by Mr. Hamilton, and amended by consent to provide that no amendments prior to 1808 should affect certain sections of the VII Article, and then appears the entry:

> "On the question on the proposition of Mr. Madison
> "and Mr. Hamilton as amended:
>
> > "Massachusetts, Connecticut, New Jersey, Pennsyl-
> > "vania, Maryland, Virginia, North Carolina, South
> > "Carolina, Georgia—ay, 9; Delaware—no, 1; New
> > "Hampshire, divided (pp. 530-532).

Here then is Article V to all intents and purposes in its present form. Here we have the complete history of its revision.

What is its significance?

Here was a sudden eruption of dissatisfaction with Article XIX. But what were the causes of this dissatisfaction? They were:

(1) That a majority of the convention could amend the Constitution.

(2) That only State legislatures and not Congress could propose amendments.

(3) That the terminology "call a convention for the purpose" was too vague.

(4) That amendments might be proposed to the States but only for unanimous ratification. This proposal was made by Sherman. The only portion of his motion which attracted attention was his requirement of unanimity; but that was immediately changed to require a three-fourth consent only.

Madison's substitute clause incorporates these changes. It permits Congress to propose amendments on a two-thirds vote (Hamilton's suggestion); it permits a proposal of amendments on the application of two-thirds of the legislatures (the original provision); it declares those amendments valid when ratified by three-fourths of the legislatures of the several states; it permits ratification by conventions in three-fourths of the states (continuing the convention system but inserting procedural rules which Madison desired); and then it introduces one new phase, never suggested or debated, that Congress should propose one or the other mode of ratification.

Is it possible to say that this substitute proposal, passed nine to one, without debate, was intended or understood to accomplish a complete and radical change in the distribution of powers as between the States and the people, and thereafter to vest in the legislatures the right to delegate to the United States those direct powers of government over the people and their rights which the convention had so insistently declared they were incompetent to grant?

We say this construction is impossible.

Hamilton declared the amendment to be a safe one, "*as the people would finally decide in the case.*" He was speaking precisely of such changes as are now in discussion. They must secure the approval of the people in convention.

Madison himself, who proposed the change, was throughout the whole history of the constitutional debates the strongest proponent of the view that the legislatures were incompetent to grant governmental powers over the people to the

United States, and that such delegation must come from the people themselves in convention.

For the convention in this manner to have taken away from the people all future control over the delegation of their rights and liberties to the United States, and to have vested it for the future in legislatures—which they consistently declared were not the representatives of the people but only of the states—and of which they as consistently declared their mistrust—would have amounted to a stultification of their views, expressed throughout the months of these debates, and an abandonment of the whole philosophy upon which they predicated the Constitution.

Before we develop this point in all its detail, we shall examine the subsequent attempts to amend Article V.

On September 15th the convention was considering the Constitution in its final form. Article XIX, as it was when the Madison form was adopted had now been renumbered as Article V.

Sherman again expressed his fear of vesting the power of amendment in three-fourths of the states.

Then he moved to strike out of Article V the words "three-fourths" both in their application to legislatures and to conventions. His motion was defeated seven to three.

Then Gerry moved to strike out the words "*or by conventions in three-fourths thereof*". *He was defeated ten to one.*

(Gerry it was who subsequently denied that there was any distinction between legislatures and conventions as representatives of the people in constitutional matters—See 1 Annals of Congress 716, quoted in the appellant's brief, p. 17. In this respect his declaration is inconsistent with the whole majority view in the convention and with Marshall's declaration in *McCulloch* v. *Maryland*, *supra*, and with the action of the convention in voting down his amendment to exclude conventions from action on amendments. It is also to be noted that Gerry it was who refused to sign the Constitution.)

Then Sherman, persistent in his idea that amendments should be unanimously accepted, proposed "that no State

shall, without its consent, be affected in its internal police or deprived of its equal suffrage in the Senate". The motion was lost eight to three.

Then he moved to strike out Article V altogether. The motion was lost eight to two.

Of all the delegates to the convention, Madison was the most emphatic in the view that the consent of the people themselves was essential for the grant to the new national government of direct powers over the people or their rights, and that this was the factor in the new government which made ratification by the legislatures impossible. Yet if the appellant's reading be accepted, *Madison himself proposed to permit the legislatures thereafter to grant away these rights which he so strongly asserted lay only in the grant of the people themselves.*

In the Appendix, we have set forth a number of the expressions of Madison made in the course of the debates during the constitutional convention, and in his numbers of the Federalist, which dispose of any possibility that he may have intended by the language of this draft to vest in the legislatures any power to grant to the United States new direct governmental powers over the people.

To those who framed the Constitution the rights of the States as such and the rights of the people were two distinct and different things. Throughout their debates they had two objects foremost in their minds. First, to create an effective National Government, which should avoid the weaknesses of the Confederation, and secondly, to protect the people and their rights from usurpation and tyranny by government. States' rights and people's rights were to be kept separate and distinct. When we come in later points to the consideration of the first ten amendments we shall find that this second ground was the gauge of battle over which the adoption of the Constitution was fought. And yet, Article V, construed literally, might lead to the result that the safeguards and the protection theretofore afforded to the people and their individual rights and liberties were placed forever

beyond their control and within the domination of the legislatures of the States, whom they distrusted, and against which they so carefully guarded themselves.

But this reading of Article V is not necessary. There is an alternative reading, reasonable and consistent with the purpose and philosophy of the convention.

The meaning of the resolution in the light of the debates is evident, that there were certain instances when ratification of new amendments by the legislatures would be perfectly proper—those instances where the machinery of government was changed without affecting its powers, or where the rights of the States as such were delegated or restricted, or where further protection was afforded to the people and their rights—but, on the other hand, there were other instances where the reference should be to the people themselves—when it was proposed to grant new powers of government directly affecting the people or their rights. Up to this time the method of amendment had been solely by convention; there was no reason why conventions should be called in the first class of cases; in our opinion it is indisputable from the record that those engaged in the work of framing the Constitution never intended by this change, agreed upon without debate, to permit the legislatures for the future to act where they were incompetent to act in the adoption of the Constitution and where the framers so frequently declared that they were to be distrusted.

But if the resolution is read in the light of the proceedings of the convention as a whole, its reasonable meaning cannot be doubted—that it provided alternative forms indeed, but alternatives to be used each in their proper sphere, well understood and well defined, which Congress was to select, not as a matter of discretion, but purely as a ministerial or administrative act.

POINT VI.

The view that Article V was never intended to enable legislatures to delegate to the United States new direct powers of government over the people is confirmed by reference to, and indeed is the only view consistent with, the Preamble and the general spirit and purpose of the instrument. And that view was publicly urged in order to secure adoption of the Constitution.

Which reading of Article V is consistent with the Preamble of the Constitution, with the understanding of the instrument as a whole in the State conventions, and with the provision in the Tenth Amendment, declaring that

> "the powers not delegated to the United States by the "Constitution, nor prohibited by it to the states, are "reserved to the states respectively, *or to the people*."

The overriding importance of the debates in the State Conventions for purposes of interpretation of the Constitution has been nowhere better stated than by Madison, in the following words, in the House of Representatives:

> "But, after all, whatever veneration might be enter- "tained for the body of men who formed our Constitu- "tion, the sense of that body could never be regarded as "the oracular guide in expounding the Constitution. As "the instrument came from them it was nothing more "than the draft of a plan, nothing but a dead letter, "until life and validity were breathed into it by the "voice of the people, speaking through the several State "Conventions. If we were to look, therefore, for the "meaning of the instrument beyond the face of the in- "strument, we must look for it, not in the General Con- "vention, which proposed, but in the State Conventions, "which accepted and ratified the Constitution."
>
> 3 Farrand's Records, p. 374.

The Preamble in express words declared the dominant purpose of the instrument "to secure the blessings of liberty to ourselves and our posterity".

This dominant purpose was repeatedly declared in the National Convention of 1787, and assumed by all its members.

5 Elliot's Debates, 127, 162, 355, *et passim.*

The great Federalist leaders had no conception that they had, by the particular language of the V Article placed all individual constitutional rights, guarded in almost every State from any interference by the State legislatures, at the mercy of the legislatures of other States. They asserted openly that these rights were fully guarded by the facts that the new Government would have only specifically delegated powers, and that the people were the recognized source from which alone further powers over themselves and their rights could come.

In the Pennsylvania Convention, the first to act, the declarations to that effect of Wilson, who had been almost foremost in the National Convention, are constant.

2 Elliot's Debates, 434-435, 436, 443-444, 453-455, 456-458, 478-479, 497-498, 502, 523.

His final declaration on the subject is worth quoting:

> "The late Convention were assembled to devise some "plan for the security, safety and happiness of the peo- "ple of the United States. If they have devised a plan "that robs them of their power, and constitutes an aris- "tocracy, they are the parricides of their country and "ought to be punished as such."

2 Elliot's Debates, 523.

Hamilton, combating the idea that any express reservation of the people's rights was needed, both in the New York Convention (2 Ell. Deb. 230) and in the Federalist (Cap. LXXXIV), spoke along similar lines, saying in the latter:

"Here, in strictness, the people surrender nothing; "and as they retain everything they have no need of "particular reservations. 'We the people of the United "'States, to secure the blessings of liberty to ourselves "'and our posterity do *ordain* and *establish* this Con- "'stitution for the United States of America.' This is "a better recognition of popular rights than volumes of "those aphorisms which make the principal figure in "several of our State Bills of Rights".

How could Hamilton have made such a statement to the people of the State of New York, in the most important document in favor of adoption, if he for a moment construed the instrument as providing that the people of New York by adopting the Constitution would be surrendering to the legislatures of ten other States the power to abrogate the constitutional rights of the citizens of New York? Nor was the Federalist merely a declaration of Hamilton, great as he was. It was the statement of the proponents of the Constitution as to its meaning, urged to those who were asked to adopt it, with that meaning attributed to it, that the Preamble controlled and limited all the powers granted by the instrument.

And these general views as to the source of power of the National Government and limits of grants found later expression by Marshall in the Supreme Court.

> *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 405; *Marbury* v. *Madison*, 1 Cranch 137, 176.

In the Massachusetts Convention Bowdoin, Parsons, Varnum and Dalton made similar statements.

> 2 Elliot's Debates, 78, 87-88, 93, 141, 162.

These were declarations by those who proposed the Constitution to the people for their acceptance, that it was the intent and purpose of the instrument that there should be no way in which the new Government might gain added or more extended powers over the people without their own consent.

Nowhere are these prevailing opinions of the efficacy of this dominant intent to control the meaning of the particular clauses of the instrument better brought together than in the debates in the House of Representatives, at its first Session, over the form to be adopted in framing the first ten amendments.

Thus we find Madison, the Father of the Constitution, saying over and again during those debates:

"I believe that the great mass of the people who op-
"posed it, disliked it because it did not contain effectual
"provisions against the encroachments on particular
"rights, and those safeguards which they have been long
"accustomed to have interposed between them and the
"magistrates who exercise the sovereign power; nor
"ought we to consider them safe, while a great number
"of our fellow-citizens think these securities necessary.

"It is a fortunate thing that the objection to the Gov-
"ernment has been made on the ground I stated; because
"it will be practicable, on that ground, to obviate the ob-
"jection, so far as to satisfy the public mind that their
"liberties will be perpetual, and this without endanger-
"ing any part of the Constitution which is considered as
"essential to the existence of the Government by those
"who promoted its adoption."

1 Annals of Congress 433.

"It may be said, indeed it has been said, that a bill of
"rights is not necessary, because the establishment of
"this Government has not repealed those declarations of
"rights which are added to the several State constitu-
"tions; that those rights of the people which had been
"established by most solemn act, could not be annihilated
"by a subsequent act of that people, who meant, and de-
"clared at the head of the instrument, that they ordained
"and established a new system, for the express purpose
"of securing to themselves and their posterity the liber-
"ties they had gained by an arduous conflict."

Ibid. 438-439.

"I admit, with the worthy gentleman who preceded
"me, that a great number of the community are solicitous

"to see the Government carried into operation; but I be-
"lieve that there is a considerable part also anxious to
"secure those rights which they are apprehensive are
"endangered by the present Constitution. Now, consid-
"ering the full confidence they reposed at the time of its
"adoption in their future representatives, I think we
"ought to pursue the subject to effect. I confess it has
"already appeared to me, in point of candor and good
"faith, as well as policy, to be incumbent on the first
"Legislature of the United States, at their first session,
"to make such alterations in the Constitution as will give
"satisfaction, without injuring or destroying any of its
"vital principles."

Ibid, 706.

"I appeal to the gentlemen who have heard the voice
"of their country, to those who have attended the debates
"of the State conventions, whether the amendments now
"proposed are not those most strenuously required by the
"opponents of the Constitution? It was wished that
"some security should be given for those great and essen-
"tial rights which they have been taugh to believe were
"in danger. I concurred, in the convention of Virginia,
"with those gentlemen, so far as to agree to a declara-
"tion of those rights which correspond with my own judg-
"ment, and the other alterations which I had the honor
"to bring forward before the present Congress. I ap-
"peal to the gentlemen on this floor who are desirous of
"amending the Constitution, whether those proposed are
"not compatible with what are required by our constitu-
"ents? Have not the people been told that the rights of
"conscience, the freedom of speech, the liberty of the
"press, and trial by jury, were in jeopardy? that they
"ought not to adopt the Constitution until those impor-
"tant rights were secured to them?"

Ibid, 746.

During this debate, it was further observed by Congress-
man Hartley as to the clause guaranteeing freedom of speech
of the press and of assemblage for the common good and the
people's right to apply for redress from grievances, that it

"had been asserted in the convention of Pennsylvania, by "the friends of the Constitution, that all the rights and "powers that were not given to the Government, were "retained by the States and the people thereof. This "was also his own opinion; but as four or five States had "required to be secured in those rights by an express "declaration in the Constitution, he was disposed to "gratify them; he thought everything that was not in-"compatible with the general good, ought to be grant-"ed, if it would tend to obtain the confidence of the people "in the Government; and, upon the whole, he thought "those words were as necessary to be inserted in the dec-"laration of rights as most in the clause."

Ibid, 732-733.

The reference to the "friends of the Constitution in the Pennsylvania Convention" is evidently to the weighty speeches of Wilson in that Convention, to which we have already referred.

Congressman Tucker said:

"But, notwithstanding all these objections to obtain-"ing amendments after the ratification of the Constitu-"tion, it will tend to give a great degree of satisfaction "to those who are desirous of them, if this House shall "take them up and consider them with that degree of "candor and attention they have hitherto displayed on "the subjects that have come before them; consider the "amendments separately, and, after fair deliberation, "either approve or disapprove of them. By such con-"duct, we answer in some degree the expectations of "those citizens in the several States who have shown so "great a tenacity to the preservation of those rights and "liberties they secured to themselves by an arduous, per-"severing, and successful conflict."

Ibid, 758-759.

The general purpose declared in the Preamble governs and limits all provisions of the Constitution.

Gibbons v. *Ogden*, 9 Wheat. 1, 188-189.

Nothing had been more clearly declared in the whole proceedings for the adoption of the Constitution than that the States, as such, had no power to confer governmental powers over the people or their rights on the new Government, and that the State legislatures had no power to act as representatives of the people in granting such powers.

It was equally declared, without contradiction, in 1789, that under the V Article, still unamended, the Legislatures, in adopting amendments pursuant to that Article, acted not as representatives of the people, but as representatives of their respective States. And that opinion was adopted and put in effect by the House of Representatives, at its first session, by a two-thirds vote.

1 Annals of Congress, 766.

And this action of the House was concurred in and adopted by a two-thirds vote in the Senate.

Ibid, 88.

Following out the principles of construction we have been considering, and applying them to the Preamble and the V Article, we find them completely harmonized in entire accord with the dominant intention declared in the Preamble, and with that held out to the Conventions of the People in their several States, by merely regarding the duty and power of Congress in selecting a mode of adoption of amendments as ministerial only, and not as arbitrary and conclusive, but dependent for the efficacy of amendments on their having been adopted by the bodies holding the power to grant what was sought by the amendment, i. e. in regard to rights and powers of the States, which the States might deem it advantageous to surrender, the States themselves acting by their recognized representatives, the State legislatures; in regard to further rights or powers over the people and their rights, the people themselves in Constitutional conventions assembled in their several States.

The great advocate of the federal view, Hamilton, said in relation to the exercise off the amending power:

> "But it is evident, that all conjectures of this kind must "be extremely vague and fallible; and that it is by far the "safest course to lay them altogether aside; *and to con-* "*fine our attention wholly to the nature and extent of* "*the powers, as they are delineated in the constitution,* "*every thing beyond this must be left to the prudence* "*and firmness of the people; and who, as they will hold* "*the scales in their own hands, it is to be hoped, will* "*always take care to preserve the constitutional equi-* "*librium between the general and the state governments.* "Upon this ground, which is evidently the true one, it "will not be difficult to obviate the objections, which "have been made to an indefinite power of taxation in "the United States."
>
> The Federalist, Cap. XXXI.

One culminating fallacy of the appellant's construction of Article V remains still to be observed.

In their own states the people would not trust their legislatures with complete power. The legislatures were hedged about and circumscribed by constitutional limitations.

Neither were the people willing to trust the National Legislature or Congress with unrestricted power. They were not even willing to rely upon the fact that the United States was a government only of delegated powers, and could not exceed the terms of that delegation. They insisted upon specific and express limitations and safeguards. Some of those are expressed in the original Constitution itself; the remainder are to be found in the first ten Amendments.

Yet, the appellant contends that the people, unwilling to trust their own legislatures within the States, and unwilling to trust the National Legislature in the National field, nevertheless consented that the State legislatures might grant away to the National Legislature every right and power which they had safeguarded, or thought they had safeguarded, in the Preamble and in the other provisions of the Constitution. In short, holding firmly to their purpose to safeguard

the rights of the people against aggression by any form of government, National or State, and believing that they had done this, the contention now is made that, by giving the State legislatures power to ratify, the people themselves have abandoned all protection. The logic of the argument is that, though they had intended to safeguard the people against their legislatures, the result they have achieved is to safeguard their legislatures against the people, and to permit the legislatures by their action to take away the people's rights. *For it is clear that if the power of amendment by the legislatures can go to every part of the Constitution, it can go even to amending the Bill of Rights itself.* Thus, legislatures are put upon an equal plane of power with the people themselves and, indeed, may take away the most fundamental rights of the people.

We say that this conclusion can not stand in the light of the history of the Constitution, which we have reviewed. The fundamental principle of that convention was that powers over the people must be derived from the people. Legislatures do not represent the people but only the States; the people act only through conventions. To grant the legislatures power to delegate powers over the people to the National Government would wipe out the distinction between powers possessed by the States and powers possessed by the people. There would then be no rights to be reserved to the people as declared in the Tenth Amendment. Every protection sought in the Constitution and the ten Amendments would be taken from the people and subjected to the power of the legislatures. The legislatures, State and National, lacked the confidence of the framers of the Constitution and those who adopted it. The history of the V Article itself is inconsistent with the interpretation which the appellant seeks to put upon it.

The language of the resolution prepared by Hamilton to express the approval of New York declares the view of those who drafted and adopted the Constitution, beyond the possibility of question or escape.

"We, the delegates of the People of the State of New "York in Convention assembled, having maturely con- "sidered the Constitution for the United States, agreed "to on the 17th day of September, in the year Seventeen "hundred and eighty-seven * * * do declare and make "known, in the name of the people aforesaid, that the "powers granted in and by the said Constitution, being "derived from the People of the United States, may be "resumed by them whenever they shall judge it neces- "sary to their happiness, *that every power not granted "thereby remains either to them or their respective state "governments, to whom they may have delegated the "same; that therefore no right of any kind, either of the "People of the respective states or of the said govern- "ments, can be cancelled, abridged, restrained or modi- "fied by Congress*, or by any officer or department of the "United States, *except in conformity to the powers given "by the said Constitution*, that among other essential "rights the liberty of conscience and of the press cannot "be cancelled or abridged by any authority of the United "States."

1 Works of Hamilton, pp. 500-501.

These declarations of purpose and intent are determinative of the meaning of Article V.

B.

THE RESERVATION IN THE TENTH AMENDMENT ELIMINATES ANY POSSIBILITY OF POWER OF THE LEGISLATURES TO ADOPT AMENDMENTS GRANTING TO THE NATIONAL GOVERNMENT ANY ADDITIONAL POWERS OVER THE PEOPLE OR THEIR RIGHTS.

POINT VII.

Aside from the question whether what we urge is the true construction of the language of the original instrument, the historic fact that this was the intention of those who adopted it is important in its bearing on the adoption, the construction and the true interpretation of the Tenth Amendment.

The debates in the 1787 National Convention, in the State adopting conventions and in the First Congress are replete with statements of this general understanding.

Under this Point we are dealing with the historic fact that the men who adopted the Constitution had no intention of conferring on three-fourths of the legislatures the unlimited power to adopt amendments giving to the new National Government additional powers over the people, beyond those which the people themselves were conferring on it.

That historic fact affords a basis at once for the adoption and for the interpretation of the X Amendment.

Wholly irrespective of the *question of law*, whether by the true construction of the instrument, the dominant aim and purpose, declared in the Preamble, limited and controlled the provisions of the V Article, so as to make it necessary to apply to the true source for any new power sought, stand the

unquestionable historic *facts* that such was the *intention* of those who adopted the Constitution, and such was the representation made to them by the proffererers of the instrument to induce its adoption. The representations and their making are on the record. As to the actual intention, the Chief Justice, less than half a year ago stated publicly in his address before the American Bar Association and their guests at Chicago:

> "The founders sought to establish representative gov-
> "ernment, but they had a profound distrust of legis-
> "latures."

Did they *intentionally* entrust to the distrusted legislatures the absolute power to deprive the people of every one of the highly prized rights they had just preserved by a bloody and exhausting war, from the effects of which they were still gasping?

Is it believable that the freemen of Massachusetts, New York and Virginia, who had by their State Constitutions just forbidden their own legislatures even to touch these sacred rights, knowingly intended to grant the absolute power to wipe out every one of them, to the legislatures of the ten other States, in whose selection, even, they could have no voice.

That such was not the intention in any State was so clear, that Chief Justice Marshall could say, with the approval of the entire Court, concerning matters then within their personal knowledge:

> "Would the people of any one State trust those of
> "another with the power to control the most insignificant
> "operations of their State Government? We know they
> "would not."
>
> *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 431.

Had the instrument been one between private parties, and the Court was of opinion that the language of some one clause of the instrument was so specific and clear that it had to be construed so as to conflict with the real intention, and in

opposition to the representations made as to its meaning in order to induce its adoption, and intention and representations were to like effect, it would be clearly a case where equity in the exercise of its great powers, would reform the instrument to conform to the real intention. The Court has no such power in dealing with the Constitution. But it will, in such a case, look attentively to see if *by subsequent provision* the dominant intention has not been made controlling over the particular phrase, or whether the power that was inconsistent with the real intention of the parties has not been superseded and revoked.

A provision to that effect, susceptible of no other meaning, adequate in its terms, deliberately and specifically made applicable to this power of legislatures to adopt any amendments giving to the National Government additional powers over the people, we find in the X Amendment.

POINT VIII.

The whole great struggle over the adoption of the constitution (save only in Rhode Island and, questionably, in New York) was not over whether *a* National Government, *a* more perfect union, should be created: but over whether *the* constitution as proposed should be adopted without being first amended so as to provide expressly that the new government should have no power to acquire additional powers over the people or their rights beyond those expressly conferred on it by the original instrument, without express consent of the people. It was only by public promises that such amendments would be made that adoption by the people of the requisite nine states was secured.

Although it was generally then assumed that the power of amendment was limited by the terms of the Preamble, as urged in Point IV, the importance of express limitation of the power of amendment, so that no other construction could ever be placed on it, was specifically asserted.

The first ten amendments were adopted for the *express* purpose of safeguarding the people forever in these respects. They must be construed accordingly.

When the Constitution came before the people of the several States for adoption, serious fears were widely entertained that the powers conferred might somehow be used or amplified to endanger the liberties of the people.

Barron v. *Baltimore*, 7 Pet. 243, 250.

All the arguments of Hamilton, Wilson and Madison that the new Government was one of delegated powers only, and that consequently restrictions were wholly unnecessary (and, according to Hamilton and Wilson, even dangerous, through possible implication that any rights not specifically mentioned as reserved would be subject to the National power), could not overcome the resistance on this ground to the adoption of a Constitution which might imperil those "characteristic rights of freemen", which the Revolution had been fought to preserve, and the impregnable fortification of which was the declared purpose of the first ten amendments.

> "It is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> "In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States."

Barron v. *Baltimore*, 7 Peters 243, 250.

Contrary to the common impression, the struggle was not (except in New York and Rhode Island) over whether *a* new National Constitution should be adopted, but over whether the Constitution as submitted should be amended *before adoption* so as to safeguard the people and impregnably fortify their rights against any possible encroachments of Federal power.

They specially feared what Justice Bradley later happily described as "neat and skillful manipulation of its words"; and were determined that the prohibitions on extension of the National power over the individual and his rights should be made express.

The great cry was for the incorporation of a Bill of Rights.

It was obvious that the peoples of Massachusetts, Virginia and New York, who would not trust their own legislatures with the power to infringe their dearly bought rights, would be quite unwilling to entrust such power to legislators elected in other States.

As Chief Justice Marshall put it:

> "Would the people of any one State trust those of "another with the power to control the most insignificant "operations of their State government? We know they "would not."
>
> *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 431.

Nor were our fathers in the several States intentionally building up what was to them a new foreign Parliament, called a Congress, to be able to arrogate to itself the very powers over their individual rights as freemen that they had just successfully denied to King and Parliament combined (associated in most of the States with their own Colonial Government); and which they had later specifically refused, in most of the States, to their own State Governments.

The common criticism was that there was no positive reservation of the rights of individuals.

It was in vain that the leading supporters of adoption of the proposed Constitution without prior amendment urged the impossibility of re-assembling the Convention, or ever otherwise getting together on anything else.

In despair the leaders in favor of adoption openly promised that, if adopted, it would be at once amended to meet the objections raised.

Barron v. *Baltimore*, 7 Pet. 243, 250.

Even with these promises the fears were so serious that it was only by narrow majorities that the Constitution was adopted in State after State.

New York	30	for to	27	against
Massachusetts	187	" to	168	"
New Hampshire	57	" to	46	"
Virginia	89	" to	79	"

The situation under the original Constitution which it was sought to meet by the first ten amendments was threefold.

1. The "characteristic rights of freemen" were not affirmatively guarded or preserved, and the people feared this. Accordingly, we find incorporated and declared, in the first eight amendments, guarantees of fundamental individual rights which had formed the theme of Magna Charta, of the Petition of Right, of the Bill of Rights, and of the Declaration of Independence.

2. Mindful of the point suggested by Hamilton and Wilson that a listing of reserved rights might imply that any others, not specifically listed, might be considered as impliedly subjected to the new Government's power, the Ninth Amendment provided that no such implication should ever be drawn.

3. The point was expressly raised that unless the power of amendment were equally limited, the other safe-guards of the people's rights amounted to nothing.

Winthrop publicly wrote to the Massachusetts Convention:

> "Whatever way shall be chosen to secure our rights, the same resolve ought to contain the whole system of amendment."
>
> Letter of Agrippa, Feb. 5, 1788; Ford, Essays on the Constitution, p. 122.
>
> Cf. 2 Farrand's Records, 630.

If there were such unlimited powers in a few legislatures they could override every one of the reserved rights covered by the first Ten Amendments; they could change the government of limited powers into one of unlimited powers; they could declare themselves hereditary rulers; they could abolish religious freedom; they could abolish free speech and even the right of the people to petition for redress; they could not only abolish trial by jury, but even the right to a day in court.

If there be no limitation on this absolute power of amendment by Legislatures, then, instead of being the great charter of the liberties of the people that it was intended to be, as declared in its Preamble, and as it has always been supposed to be, at least since the adoption of the first Ten Amendments, the Constitution of the United States established the most absolutely despotic power ever conferred on any civilized government, and on one of that worst of all forms, an oligarchy.

None of us believe that any such absolute powers lawfully exist in any little band of legislators exercising Federal functions.

Somewhere in this great charter of liberty, there is something, overlooked in these recent days, even by this Court, which stands in the way of any such despotic powers.

Where and what is that provision?

The principle that such restraints existed somewhere in the instrument was declared by Chief Justice Marshall in the earliest of his opinions expounding the Constitution, in the clause we have quoted.

Marbury v. *Madison*, 1 Cranch 137, 176.

And if we find such provision, and find that this Court overlooked it, that no counsel called attention to it, that the court never adverted to it, that it has passed *sub silentio* in each decision concerning the XVIII Amendment, that it was put into the Constitution for the very purpose of forever

preventing the existence of any such unlimited powers of amendment by any but the people themselves, then we shall have fully demonstrated that the question we present is *res nova*, not foreclosed by any decision that has passed over it *sub silentio*.

It was to safeguard the rights and powers of the people and reserve them to themselves alone, that the first ten amendments were demanded, were proposed and were adopted.

The whole literature of the period of the adoption of the Constitution and the first Ten Amendments is one great testimony to the insistence that the Constitution must be so amended as to safe-guard unquestionably the rights and freedom of the people so as to be secure from any future interference by the new government, or any extension of its powers to matters the people had not already given into its control, unless by their own consent.

Long afterwards in *Ex parte Milligan* (4 Wall. 2, 120), their attitude was summed up by this Court.

Any possible power of the Federal Government to enlarge its own powers over the people by the vote of those who, this Court has said, are exercising a Federal function, had to be curtailed, or every other safe-guard was a mere "scrap of paper". None saw this more clearly than Roger Sherman, James Winthrop and John Marshall.

The First Message of President Washington to Congress, which brought the subject to the attention of the First Congress (which proposed the amendments), contained the following paragraph:

> "Besides the ordinary objects submitted to your care, "it will remain with your judgment to decide how far an "exercise of the occasional power delegated by the Fifth "Article of the Constitution is rendered expedient at the "present juncture by the nature of objections which have "been urged against the system, or by the degree of "inquietude which has given birth to them. Instead of "undertaking particular recommendations on this sub- "ject in which I could be guided by no lights derived

"from official opportunities, I shall again give way to "my entire confidence in your discernment and pursuit "of the public good; for I assure myself that whilst you "carefully avoid every alteration which might endanger "the benefits of an united and effective government or "which ought to await the future lessons of experience, "*a reverence for the characteristic rights of freemen* and "a regard for the public harmony, will sufficiently influ-"ence your deliberations on the question *how far the "former can be impregnably fortified*, or the latter be "safely and advantageously promoted."

1 Messages and Papers of the President (Richardson, 1896), 53.

And the House in its responsive address to the President said:

"The questions arising out of the Fifth Article of the "Constitution will receive all the attention demanded by its importance; *and will, we trust, be decided under the "influence of all the considerations to which you allude.*"

1 Benton's Abridgment, 47.

The Senate likewise in its responsive address to the President said:

"We beg you to be assured that the Senate will, at all "times, cheerfully cooperate in every measure, which "may strengthen the Union, conduce to the happiness, *or "secure and perpetuate the liberties* of this great confed-"erated public."

1 Benton's Abridgment, 13.

The impregnable fortification and the perpetual security of the liberties of the people from encroachment by the Federal Government were thus declared, not only by the demands of State Conventions, and by publicists, but also by the President and by each House of Congress, to be the moving purpose of the amendments the Congress proposed.

It was for these purposes that the first Ten Amendments were proposed and adopted; and they are to be construed in the light of these purposes.

As Justice Bradley wrote concerning the XI amendment, with the concurrence of Justices Waite, Miller and Gray, and without contradiction from the rest of the Court:

> "The Eleventh Amendment is not intended as a mere "formula of words, to be slurred over by subtle methods "of interpretation, so as to give it a literal compliance, "without regarding its substantial meaning and purpose. "It is a grave and solemn condition, exacted by sovereign "States, for the purpose of preserving and vindicating "their sovereign right to deal with their creditors and "others propounding claims against them, according to "their own views of what may be required by public faith "and the necessities of the body politics. *We have no "right, if we were disposed, to fritter away the substance "of this solemn stipulation by any neat and skillful "manipulation of its words. We are bound to give to it "its full and substantial meaning and effect. It is only "thus that all public instruments should be construed.*"
>
> Virginia Coupon Cases, 114 U. S., 269, 332.

Moreover, it was declared in the very Preamble to the Constitution that it was ordained and established by the people of the United States, "*to secure the blessings of liberty to ourselves and our posterity.*"

It was to bring the instrument unquestionably into line with its own declared main purpose of securing the blessings of liberty to ourselves and our posterity that the first Ten Amendments were adopted. And they are to be construed in accordance with that declared purpose of the Constitution and the intention of those who adopted it, and with the declared purposes of their adoption of the ten Amendments, and with the great doctrines of constitutional construction so laid down by Justices Bradley, Waite, Miller and Gray.

POINT IX.

The phraseology of the X Amendment was deliberately altered by Congress before its submission so as expressly to prevent any possible power of legislatures to adopt amendments granting any added powers over the people and their rights, which added powers lay only in the gift of the people. The reservation "to the people" did not mean acting by votes of the legislatures, but meant acting in and through constitutional conventions chosen for the purpose. For over a century this idea permeated the decisions of this Court and the declarations of our greatest constitutional lawyers.

When the first Congress met, the matter of the promised amendments to "fortify impregnably the characteristic rights of freemen" and to "secure the blessings of liberty to ourselves and our posterity" was brought up.

After a prolonged struggle the entire matter of the amendments was referred to the Committee of the Whole, and there finally emerged from that Committee twelve proposed amendments, of which two were later rejected and need not particularly further concern us.

(1) *All ten of the amendments adopted were deliberately drawn to override any and all provisions of the original instrument which might endanger the freedom of the people or enable the new Government to gain added powers over the people and their individual rights, and were purposely put in general form to avoid any direct alteration of the language of the original instrument.*

The framework of the ten is striking.

It had been proposed to go through the Constitution and alter particular phrases here and there, but that method was

deliberately voted down after long debate. The House expressly voted not to attempt to amend any provisions of the original instrument by altering its language.

2. Congr'l Register, 241;
1 Annals of Congress, 766.

Roger Sherman moved the adoption of this method of amendment by overriding provisions, instead of by corrections of the text of the original instrument. He argued:

> "We ought not to interweave our propositions into the "work itself, because it will be destructive of the whole "fabric. We might as well endeavor to mix brass, iron "and clay as to incorporate such heterogeneous articles, "the one contradictory to the other. * * * When an alter- "ation is made in an act, it is done by way of supplement, "the latter always repealing the former in every specified "case of difference."

2 Congr'l Register, 167.

In Committee of the Whole Sherman's motion was voted down on August 13th, 1789 (1 Annals of Congress, 717). But on August 19th, 1789, he renewed his motion on the floor of the House, and after a repetition of the debate it was carried by a two-thirds vote.

2 Congr'l Register, 241;
1 Annals of Congress, 766.

How completely Congress abandoned the former method is apparent on the most casual inspection. No one of the Ten Amendments refers in specific terms to any particular article, section or clause of the original instrument, or attempts to alter a word of the original text.

Nor did either of the two rejected amendments contain any such specific reference, though one, at least, dealt with a subject peculiarly fit for such treatment, the number of members of Congress.

The first eight of the ten are framed to protect from all possible encroachment by the new Government ancient and familiar individual rights declared in Magna Charta, in the Petition of Right, in the Bill of Rights and in the Declaration of Independence.

The Ninth met the point raised by Wilson and Hamilton of possible danger from an enumeration of rights to any right not specifically enumerated, by declaring:

> "The enumeration in the Constitution, of certain "rights, shall not be construed to deny or disparage "others retained by the people."

The whole field of *rights* of individuals was thus covered by the first nine amendments.

The X Amendment had thus nothing left to deal with in the way of *rights*. It, accordingly, does not even mention rights. It deals exclusively with *powers*.

As it emerged from the Committee of the Whole the X Amendment read:

> "The powers not delegated by the Constitution nor "prohibited by it to the States, are reserved to the States "respectively."

Daniel Carroll of Maryland moved to amend this clause by adding the words "or to the people" at the end, and this was at once "agreed to", apparently without debate.

1 Annals of Congress, 761.

Finally, Roger Sherman, who, in the Constitutional Convention of 1787, had vainly striven to limit the amending power (2 Farrand, Records of The Federal Convention, 558, 630) and who, in Congress, had insisted on the general form of emendation (1 Annals of Congress, 766; 3 Congr'l Reg., 241), moved to alter the language of the draft of the X Amendment by inserting the words "to the United States" after the word "delegated", making it read:

"The powers not delegated *to the United States* by the "Constitution, nor prohibited by it to the States, are "reserved to the States respectively, or to the people."

This was unanimously agreed to without debate.

1 Annals of Congress, 768.

And the Tenth Amendment went out in that form and was adopted unanimously.

The Tenth Amendment thus went out designed, deliberately, not to correct, but to override the original text of the Constitution, if anywhere it might be found to conflict therewith.

Under the resolution, adopted on Sherman's own prior motion, the X Amendment could not be framed to alter the text of the V Article. But it could be framed to override any adverse construction. Without departing from that resolution it could not alter the language of the V Article; but it could be put in terms clearly referring to and limiting the method of exercise of the amending power.

That it was the intention to have the X Amendment override the provisions of the V Article, if they were of the unlimited character now claimed, was made clear by the corrections made in its language by the House on the motions of Daniel Carroll and Roger Sherman.

(2) *Carroll's alteration of the original draft of the X Amendment asserted the supreme powers of the people as distinguished from those of the States.*

It is a simple rule of hermeneutics that deliberate alterations of the text must be regarded as strong indications of the intent. Its most familiar application is where written words inserted in a printed form are deemed, in case of conflict between them, to override the printed form.

Where we have, as here, irrefragable proof of the alterations in the draft, the alterations are to be given their full

force, comparing the original text of the amendment with the altered text.

As it emerged from the Committee of the Whole, the X Amendment, filled but a single purpose, *reserving* to the States respectively all governmental powers they had respectively previously possessed, except those delegated by the Constitution, and those thereby prohibited to the States.

Daniel Carroll of Maryland moved to amend the X Article, as drafted, by adding at its end the words "or to the people". Carroll with a clear vision of our basic law and a keen appreciation of the rights of the people and their ultimate sovereignty, was pointing out that the ultimate sovereignty was still to reside in the people, and the State Governments still to be restricted by the prohibitions in their State Constitutions, and the powers of the people still to be reserved to them alone. His point was grasped promptly and his correction agreed to.

1 Annals of Congress, 761.

Something was, then, reserved to the people, as distinguished from the States.

What was it?

If the Fifth Article gave absolute, unlimited and unrestrainable authority to a few legislators to deprive the people of their every right, in spite of the Tenth Amendment, was there anything reserved to the people?

Is there any explanation possible in the face of Sherman's statements in the House and of the House resolution modifying the language of the first ten amendments accordingly, on his motion that the legislatures in adopting amendments acted as representatives of the States and could not act as the representatives of the people (1 Annals of Congress, 708-715, 761-768), that Congress, in adding the words "or to the people", at the suggestion of Carroll, intended deliberately to reserve to the people assembled in conventions, the sole power of granting additional powers over themselves and

their rights as freemen—to *reserve* them to the people alone, where alone that power originally had existed?

We may justly rely on this declaration of Sherman's, still echoing in the House when they agreed to Carroll's correction, as indicating what they meant by "reserved to the people".

> *Reed* vs. *Insurance Co.*, 95 U. S. 23;
> *Kenyon* vs. *Knights Templar Association*, 122 N. Y. 247.

It is not a *grant* to the Legislatures. It is a *reservation* to the original holder.

(3) *Roger Sherman's correction pointed the X Amendment directly at the power of legislatures to adopt amendments granted by the V Article.*

Sherman's own fears had received emphasis from the widespread opposition to the adoption of the unamended Constitution.

He could not have been ignorant of Winthrop's clear statement of the absolute necessity that any reservation of the people's rights, to be really efficacious should "contain the whole system of amendment".

> Letter of Agrippa to the Massachusetts Convention of Feb. 5, 1788; Ford, Essays on the Constitution, p. 122.

Sherman proposed that the X Amendment, as already corrected by the House on Carroll's earlier motion, be further corrected by adding the words "to the United States" after the word "delegated".

> 1 Annals of Congress, 768.

The effect of this limitation is obvious.

It distinguishes sharply between powers delegated "to the United States", and other powers delegated by the Constitu-

tion to other authorites, and *reserves* the latter class "to the States respectively or to the people".

Search the Constitution through, there is but on specific power delegated by it that was not delegated "to the United States", and that was the power of legislatures to adopt amendments, which clearly was not a power delegated "to the United States".

2 Curtis Const'l. Hist'y. 162.

Were that unlimited power of amendment one delegated "to the United States" all the limitations on the National Power, whether express or implied, would have been meaningless.

Marbury v. *Madison*, 1 Cranch, 137, 176.

As long as the method, deliberately adopted, of phrasing amendments by general overriding provisions, instead of by alteration of the language of particular sections and clauses, was adhered to, it would be difficult to make the reservation in this X Amendment more clearly include this amending power mentioned in the V Article.

If, in a bill of sale, starting as one of "all cattle belonging to A" there were inserted after the word "cattle" the words "over two years old", it would seem to be a specific and express exception of those not over two years old.

Sherman's insertion of the words "to the United States" was an equally specific and express reference to the one power delegated by the Constitution which was *not* "delegated to the United States", namely, the power conferred on legislatures by the V Article, to adopt amendments granting additional powers which lay only in the gift of the people. That power was branded and ear-marked.

If the X Amendment did not reserve to the people the sole power to adopt amendments enlarging the powers of the Federal Government over themselves and their rights, what powers were thereby reserved to the people?

Some answer must be made. The reservation was not meaningless.

If the supposed unlimited power of legislatures to amend away all rights of the people was not taken away from them what was left to the people? Their power, their one life-giving part in the government, was the power to fix, delimit and confer the powers delegated to the new government. If *that* power was not *reserved* to them, nothing was "reserved to the people."

> "A power to build up what another may pull down at "pleasure is a power which may provoke a smile but can "do nothing else" (Pinckney, 4 Wheat. 391).

Carroll's correction unquestionably reserved *some* powers to the people. What were those powers unless they were the powers of adopting amendments by which they might delegate added powers over themselves and their rights as freemen?

What possible purpose could Sherman's correction serve other than this of reserving to the people the sole power of adopting any amendments which would give to the new government any added powers over them and their rights?

All the characteristic rights of freemen, subject only to the power of amendment, were, but for this power of amendment, safeguarded by the first nine Amendments. That subject of *rights* had been exhausted, and so the X Amendment drops the subject of *rights* and deals expressly and solely with *powers*, and, by Roger Sherman's correction, specifically with the power of amendment.

Unless the power of amendment by legislatures was likewise limited, those safeguards *of rights* were but "scraps of paper".

The Tenth Amendment thus necessarily reserves to the people the power, which they had had from the beginning, to grant any further powers over themselves and their rights.

By this construction alone do the first ten amendments carry out the purpose of their adoption, openly avowed by

President Washington and by both Houses of Congress, of *fortifying impregnably* the characteristic rights of freemen.

By this construction of the X Amendment alone is the Constitution brought into line with its own Preamble "to *secure* the blessings of liberty to ourselves and our posterity".

By this construction alone is the X Amendment, as corrected by Carroll and Sherman, given force and effect in accordance with its own terms.

By this construction alone is what was intended as a great charter of freedom prevented from becoming a charter of absolute oligarchic despotism.

By this construction alone is *any* force given to the X Amendment.

By this construction alone is *anything* reserved *to the people*.

This provision that only the people can surrender their rights or grant further powers over themselves, is the vital clause that makes this a Government *by the people*. That it was intended to be such a government, that it has been maintained as such a government, that we should maintain it as such, finds no clearer exposition than in the words of Marshall in *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 404-405; and in the words of Abraham Lincoln in the Gettysburg Address.

This provision of the X Amendment restricting the amending power is the corner-stone of all our rights and liberties.

Without it the Constitution is not a charter of liberty, but a charter of despotic oligarchic power.

We have seen that *impregnable fortification* of the characteristic rights of freemen, was the demand of the people and the declared purpose of President Washington and of both Houses of Congress; that the necessity of clearly limiting correspondingly the amending power had been declared by Winthrop, and that the intent to do so was specifically involved in Roger Sherman's correction of the wording of the Tenth Amendment, adopted unanimously by the House and Senate.

Satisfied that this work had been accomplished by the ten Amendments, that the Constitution forever protected these rights of freedom, the whole country accepted the Constitution and its exposition by the Supreme Court under the leadership of John Marshall.

For over a hundred years there runs through the opinions of the Supreme Court, the conception that there had been created a government *by* the people, of the people, for the people, and that the sacred rights of freedom which the Revolution had been fought to preserve were safeguarded from any hands but their own. And the like view was voiced by the greatest of our other Constitutional lawyers.

The fears that had been raised by the original instrument had been completely allayed by the adoption of the first Ten Amendments.

Marbury v. *Madison*, 1 Cranch, 137, 176;
McCulloch v. *State of Maryland*, 4 Wheat. 316, 404, 405, 406, 431;
Cohens v. *Virginia*, 6 Wheat. 264, 369;
Barron v. *Baltimore*, 7 Peters, 243, 250;
Fox v. *Ohio*, 5 How. 410, 434;
Ex parte Milligan, 4 Wall. 2, 119-120;
Gibbons v. *Ogden*, 17 Wall. 610, 623;
Munn v. *Illinois*, 94 U. S. 113, 124;
Pembleton v. *Greenhow*, 114 U. S. 269, 291;
Turner v. *Williams*, 194 U. S. 279, 295-296;
Kansas v. *Colorado*, 206 U. S. 46, 89-90.
The Reply to Hayne, 3 Works of Daniel Webster (8th Ed'n.), 340, 346-347.
The Gettysburg Address of Abraham Lincoln.

The embryo of Lincoln's great phrase, "Government of the people, by the people, for the people", which to him embodied the whole theory of freedom, appears in Marshall's opinion in *McCulloch* v. *Maryland* (4 Wheat. 389, 404-405). That the amendments were adopted to put an end to the possibility of encroachments by the general government, and to prevent

any exercise of governmental functions in a manner dangerous to liberty. Marshall declared in *Barron* v. *Baltimore*, 7 Pet. 243, 250.

And this was long afterwards reiterated in *Ex parte Milligan*, 4 Wall. 2, 119-120.

These declarations of the Supreme Court reach their culmination in two of the above-cited opinions written by Justice Brewer:

In a concurring opinion, he wrote, in 1904:

> "Too little effect has been given to the Tenth Article "of the Amendments to the Constitution, that 'the powers "not delegated to the United States by the Constitution, "nor prohibited by it to the States, are reserved to the "States respectively, or to the people'. The powers the "people have given to the General Government are named "in the Constitution, and all not there named either ex"pressly or by implication, are reserved to the people and "can be exercised only by them, or upon further grant "from them."
>
> *Turner* v. *Williams*, 194 U. S. 279, 295.

And this was followed in 1906 by the opinion of the Court (again written by Justice Brewer) in *Kansas* v. *Colorado*:

> "The proposition that there are legislative powers "affecting the Nation as a whole which belong to, "although not expressed in the grant of powers, is in "direct conflict with the doctrine that this is a govern"ment of enumerated powers. That this is such a govern"ment clearly appears from the Constitution, independ"ently of the Amendments, for otherwise there would be "an instrument granting certain specified things made "operative to grant other and distinct things. This "natural construction of the original body of the Con"stitution is made absolutely certain by the Tenth "Amendment. This amendment, which was seemingly "adopted with prescience of just such contention as the "present, disclosed the widespread fear that the National "Government might, under the pressure of a supposed "general welfare, attempt to exercise powers which had

"not been granted. With equal determination the framers intended that no such assumption should ever find "justification in the organic act, and that if in the future "powers seemed necessary they should be granted by "the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to "the United States by the Constitution, nor prohibited "by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the "people.' Its principal purpose was not the distribution of power between the United States and the States, "but a reservation to the people of all powers not "granted. The preamble of the Constitution declares who framed it: 'We, the people of the United States', not "the people of one State, but the people of all the States. "And Article X reserves to the people of all the States the "powers not delegated to the United States. The powers "affecting the internal affairs of the States not granted "to the United States by the Constitution, nor prohibited "by it to the States, are reserved to the States respectively, and all powers of a national character which are "not delegated to the National Government by the Constitution are reserved to the people of the United "States."

Kansas v. Colorado, 206 U. S. 46, 89-90.

In these words is outlined the general line of demarcation between powers that can be surrendered by the States as such, and powers that can be conferred on the National Government by the people alone.

In perhaps the most solemn as well as the noblest words ever penned, Lincoln declared this essential principle:

"That we here highly resolve that these dead shall not "have died in vain; that this Nation, under God, shall "have a new birth of freedom, and that government of "the people, by the people, for the people, shall not perish "from the earth."

Once before in our history the attempt was made to have a majority in Congress and a legislature create a Constitution

for a section of the American people, in the face of their known will, by "neat and skillful manipulation of words" in the Federal Constitution. The fate of the infamous Lecompton Constitution should be an object lesson to those who think that any power save that of the sovereign people themselves, can establish or destroy the constitutional characteristic rights of freemen of this Republic.

The issue we raise is whether this is a government of the people, *by* the people, or an oligarchic despotism where the people have surrendered all their powers to make or unmake the Constitution, reserving to themselves—nothing.

POINT X.

The Tenth Amendment limited the Fifth Article of the constitution by wiping out any possible power of state legislatures to adopt any amendments granting any further powers that lay only in the gift of the people, and by reserving to the people themselves the sole power to adopt any such amendments, a power to be exercised by them acting in conventions of the people assembled in their several states in the manner provided in Article Five.

Just how did the Tenth Amendment affect the Fifth Article? To understand that, we must analyze Article V itself.

First of all it had provided generally for amendments, with two exceptions, one temporary. Second, it had provided two methods of *proposing* amendments, one by Congress itself, whenever two-thirds of both Houses might deem it necessary, and one by the call of a convention on the application of the legislatures of two-thirds of the States. Third, construed literally, and apart, it gave Congress *the option of selecting one* of two alternative methods of adoption of amendments, proposed in either way: (1) by ratification by the legislatures of three-fourths of the States; or (2) by ratification by the people, assembled in conventions in three-fourths of the States; and for adoption in either of these ways.

We contend that any such broad power of selection was impliedly limited by other provisions of the Constitution and expressly limited by the X Amendment.

Whatever construction is put upon it, the Fifth Article does not say, it does not *pretend to say*, that the legislatures in so voting are the agents of the people.

Leser v. *Garnett* (258 U. S. 130) and *Hawke* v. *Smith*, No. 1 (253 U. S., 221) each involve the conclusion that in adopting amendments the legislatures are *not* acting *as agents* of the people. If they were acting *as agents* of the people of

their respective States, the people thereof, their principals, would have the absolute right to limit, control, and direct their action. But this Court says in the above cases that the people of a State cannot in the slightest degree either restrain or regulate the action of members of their legislature on a proposed amendment; not even, for example, by a provision in the State Constitution that they must first hear from the people.

> "The function of a state legislature in ratifying a pro-
> "posed amendment to the Federal Constitution, like the
> "function of Congress in proposing the amendment, is a
> "federal function derived from the Federal Constitution;
> "and it transcends *any* limitations sought to be imposed
> "*by the people of a State.*"
>
> *Lesce* v. *Garnett*, 258 U. S. 130.

The action of legislatures in adopting amendments is the action of the State governments and not the action of the people, as was openly declared to the House just before its corrections of the X Amendment.

> 1 Annals of Congress, 708, 766.

It was with this distinction just drawn, that the House unanimously agreed to the reservation of all the powers not already granted to the Federal Government, "to the States" respectively "or to the people", putting in the last four words as an amendment of the language of the article of amendment.

That assembling in conventions specifically called for the special purpose is the only manner in which the people can act safely, effectively and wisely on such subjects, was declared promptly by the Supreme Court.

> *McCulloch* vs. *Maryland*, 4 Wheat., 316, 403.

Now where does the Tenth Amendment hit this assumed system of amendment provided by the V Article, and just how and in what measure does it affect it?

It does *not* touch the general provision that amendments may be made, or their scope.

It does *not* touch either of the provisions for *proposing* amendments.

It affects *only* the method of *ratification*, or in other words, the power of *adoption* of the amendment.

The word "or" in the Tenth Amendment is distributive and not alternative. Its meaning is absolutely controlled by the word "reserved". You cannot "*reserve*" to any one but the original holder. The powers that had originally belonged to the States, as States were reserved to the States. The powers that had originally belonged to the people, were reserved to the people.

The amendment thus says that if the power to be conferred by an amendment be one that the States, as such, had originally the power to confer, the power to delegate it (that is, the power to adopt the amendment) is reserved to the States respectively, acting by a three-fourths majority. But if the power to be conferred by the amendment is one that the people alone could have granted, the people *reserve* the power to delegate it, and if it can be held that they had ever parted with that power, they resume it and take it away from the legislatures. They *reserve* that power to the people, who thereforth alone can ratify such amendments. How will the people ratify? By the method laid down for their action in Article V, universally understood as the method of action by the people, by the vote of conventions of the people in three-fourths of the States.

The Tenth Amendment is not predicated on the possession or protection of any special particular right of the individual.

Those who ask whether it guarded an inalienable right to drink simply fail to understand the fundamental basis of the Constitution. It was the impregnable fortification *of the right of the citizen not to be interfered with by the general government in matters which the people had not confided to its care.*

It was but another form of the general doctrine of freedom from interference by any government outside the limits of power the people have conferred on it, which is the basic idea of civil liberty.

Even the assumption that such unlimited power to adopt amendments had been conferred on legislatures by Article V did not present the slightest obstacle to the resumption of that power by the people and its surrender by the legislatures. The same question was raised concerning the power of the people to take away from the States, by adopting the Federal Constitution, powers previously conferred by them on their several States, and met this answer:

> "It has been said, that the people had already sur-
> "rendered all their powers to the State sovereignties,
> "and had nothing more to give. But, surely, the question
> "whether they may resume and modify the powers
> "granted to government does not remain to be settled in
> "this country."
>
> *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 404.

By the amendment "reserving" their own powers to the people, deliberately adopted to override any possible previous deputation of that power, they resumed the exclusive possession of that power.

What the Tenth Amendment did to Article V was, thus, to eliminate any possible claim of power of legislatures to grant to the Federal Government added powers over the people and their rights.

The broad line of demarcation between these two classes of powers—those of the people, and those of the States, as such—was laid down by this Court in *Kansas* vs. *Colorado*, in these words:

> "The powers affecting the internal affairs of the States
> "not granted to the United States by the Constitution,
> "nor prohibited by it to the States, are reserved to the
> "States respectively, and all powers of a national char-
> "acter which are not delegated to the National Govern-

"ment by the Constitution are reserved to the people of "the United States."

Kansas vs. *Colorado*, 206 U. S. 36, 90.

Unless that supposed unlimited power of adopting amendments by a handful of legislators was unquestionably denied by the Tenth Amendment, *what was it that was reserved thereby to the people?*

POINT XI.

The provisions of Article V did not declare that the legislatures would be agents or representatives of the people in voting on amendments. The people, if called on to act would act in conventions. The method of adoption by legislatures was an alternative method of adoption without referring the amendment to the people. This was the understanding at the time and was expressly declared in connection with the reservation "to the people" made by the X Amendment.

Were the legislatures, in acting under the V Article, acting as agents of either States or people, they would necessarily be under the control of their principals.

The decisions in *Leser* v. *Garnett*, 258 U. S. 130, and the cases there cited, that State Constitutional provisions regulating the action of the legislature, in voting on a Constitutional Amendment, are void, involve, as a mere corollary, that this is not simply a provision empowering the legislatures to act as representatives and agents of the people in voting on amendments, but an independent alternative method of ratifying amendments, without going to the expense or form of submitting them to the people.

Were the legislature of a State simply the agent of the people of the State in voting on amendments to the National Constitution, the people of that State, *ex vi termini*, could control the action of that agency by provision of their State constitution.

This, it was held in *Leser* v. *Garnett*, the people of a State, and the State itself, could not do; that in voting on amendments the legislatures were *exercising a Federal* function, conferred on them by the V Article, in the exercise of which they were beyond the control of either the State or the people of the State.

The corollary thus involved in these decisions is in direct conformity with the understanding of the House of Representatives at the time it adopted the phraseology of the Tenth Amendment. In the course of the debate leading up to the framing of the amendments, and in the discussion over whether his resolution should be adopted, by which all amendments should be made, not by way of alterations of the language of the original instrument but by passing superseding provisions, Roger Sherman said:

> "The Constitution is the act of the people and ought "to remain entire. But the amendments will be the act "of the State governments."
>
> 1 Annals of Congress, 708.

Later in the course of his argument of this motion he asserted, more at length, that it was impossible to alter the text of the original document, since it ran "We the people * * * do ordain and establish and that would be an untrue statement, if applied to language altered by amendments adopted by legislatures acting merely as "representatives of the States", and not by the people acting in Conventions chosen for the express purpose.

> 1 Annals of Congress, 715;
> 2 Congr'l Register, 176.

No one attempted to dispute this clear statement of Roger Sherman, and it was with this distinction thus sharply brought to its attention in Committee of the Whole, and later reiterated on the floor of the House (id. 766), that the House of Representatives adopted, first, Carroll's amendment adding the words "or to the people" (1 Annals of Congress, 761), making the specific reservation to the people of all their own powers, and, second, Sherman's addition of the words "to the United States" (1 Annals of Congress, 768), making the amendment specifically applicable to the amending powers of legislatures granted by the V Article. These corrections

follow on the heels of this clear and uncontradicted statement in the House, and the resolution adopted to put that contention in effect, that the legislatures in adopting amendment are representing, not the people, but the State governments.

The record of the declaration of the meaning of the term at the time that they adopted it seems conclusive and to that extent in harmony with the conclusion of the Supreme Court in *Leser* v. *Garnett* that, in adopting amendments, the legislatures are acting under power delegated to them by Article V of the Constitution as an alternative method of adoption of amendments, and not as representatives of the people. That decision wholly failed to note the reservation to the people by the X Amendment, and naturally so, since the Court was there dealing with powers lying in the gift of the States.

POINT XII.

In this case of the XVIII Amendment, especially, the legislatures could not claim to act in behalf of or as representatives of the people, because it was expressly proposed "to the States".

The view expressed by Roger Sherman and adopted by the First House of Representatives in 1789, just before correcting the language of the Tenth Amendment—that the legislatures, in adopting amendments, could not act as representatives of the people, but only as representatives of the States—has since been confirmed, both by the action of Congress in proposing, and by the action of practically all of the legislatures in passing resolutions adopting amendments.

Never has Congress referred a proposed amendment to the legislatures *as representatives of the people*.

Never, that we have been able to find, have more than two legislatures ratified a proposed amendment statedly "on behalf of the people".

In a large percentage of the cases the resolutions adopting amendments in various States read that the legislature adopts the amendment in question "*on behalf of the State*".

In most other cases the legislature passes a resolution reading simply that the legislature adopts the amendment.

In but seven instances in all, occurring in three different States on different occasions (out of over two hundred and fifty resolutions examined), have we found language used in the adopting resolution stating or implying that in adopting the amendment the legislature has acted *on behalf of the people* of the State. The seven resolutions of this character are those of the Michigan legislature adopting the XIII, XIV, XV, XVII and XVIII Amendments; that of the Florida legislature adopting the XIII Amendment, and that of the Arkansas legislature adopting the XVII Amendment.

It has been difficult to find these resolution, and, out of twenty or thirty we have been unable to find, there may perhaps be two or more containing such phrases, viz.: the Michigan resolutions on the XVI and XIX Amendments. On the other hand, a large number of the resolutions as to each Amendment state expressly that the legislature adopts and ratifies the amendment "*on behalf of the State*."

The proposal and alleged ratification of the XVIII Amendment presents a situation peculiar to itself and still more remarkable.

The form of the previous Congressional resolutions proposing amendments, up to and including the XVI, had been in substance:

> "Resolved, * * * That the following Article be pro-
> "posed *to the legislatures of the several States* as an
> "Amendment * * * which when ratified by three-fourths
> "of the said legislatures shall be valid as part of the
> "said Constitution."

1 U. S. Stats. at Large, 97 (Amendts. IX);
1 U. S. Stats. at Large, 402. (Amend't. XI);
2 U. S. Stats. at Large, 306. (Amend't. XII);
13 U. S. Stats. at Large, 567. (Amend't. XIII);

14 U. S. Stats. at Large, 358. (Amend't. XIV);
15 U. S. Stats. at Large, 346. (Amend't. XV);
36 U. S. Stats. at Large, 184. (Amend't. XVI).

The resolution submitting the XVII Amendment read simply that

> "the following be proposed as an Amendment to the "Constitution, which shall be valid to all intents and "purposes as part of the Constitution, when ratified by "the legislatures of three-fourths of the States."
>
> 37 U. S. Stats. at Large, 646 (Amend't. XVII).

These resolutions of proposal, and practically all those of adoption of the first seventeen Amendments are conformable to the declarations of Roger Sherman and the First House of Representatives, that the Legislatures in adopting amendments can act only as representatives of the States, and *not* as representatives *of the people*.

But, in the case of the XVIII Amendment the matter ceases to be one of mere conformity with this ancient declaration of the meaning of the V Article, and, by a marked change of the language used by Congress, the amendment was expressly proposed "*to the States*".

The resolution proposing the XVIII Amendment, for the first time, departs from the old form and reads as follows:

> "Resolved by the Senate and House of Representa- "tives of the United States of America in Congress as- "sembled (two thirds of each House concurring therein), "That the following amendment to the Constitution be, "and hereby is proposed to the States, to become valid "as a part of the Constitution when ratified by the legis- "latures of the several States as provided by the Con- "stitution."
>
> (Here follows the text of the XVIII Amendment)
> 40 Stats. at Large, 1050.

The XVIII Amendment was, thus, *in terms*, proposed "to *the States*", and not to the people. It is the only amendment

of which this is true. When the XIX Amendment was proposed Congress returned to the form used in the case of the XVII.

41 U. S. Stats. at Large, 362.

In adopting the XVIII Amendment, the Legislatures were thus expressly invited to act as representatives of *the States*. They could act in no other way than they had been invited to act. Their power to act was limited by and predicated upon the terms of the submission to them.

This situation is emphasized by the rulings in *Hawke* vs. *Smith*, No. 1, 253 U. S. 221, and in *Leser* v. *Garnett*, 258 U. S. 130, which are inconsistent with any theory that the legislatures, in voting on constitutional amendments, are acting as representatives of the people.

Where an amendment is expressly proposed *to the States* for adoption, and the people of a State are not permitted any possible voice or control in the matter of adoption by their legislature, it is a misuse of terms to say that *the people* have adopted the amendment, or that *the people* have, through a legislature over which they are permitted no control, exercised their own reserved power to grant added governing powers over themselves.

In acting on the XVIII Amendment the State legislatures thus could not and did not act on behalf of *the people* of their respective States, nor did they pretend to (except in Michigan), nor were they asked to.

POINT XIII.

No other amendment to the Constitution has involved the question here presented, nor will the validity of any of the other amendments be impaired by an affirmance in this case.

All the amendments to the Constitution have been ratified by legislatures and recourse has never been had to ratification by conventions. This fact is urged by appellant as a practical construction of the provisions of Article 5 of the Constitution.

The contention is to be met as squarely as it is put. Undoubtedly it would be a matter of the most serious consideration if the validity of a number of amendments were involved. *Happily such is not the case.* No amendment save the Eighteenth has ever sought to delegate the National Government any added direct powers over the people or their individual rights.

The court below (R. p. 35) carefully analyzed the nature of the other amendments and clearly pointed out the fundamental difference between the Eighteenth Amendment and the others.

We revert to the classification of constitutional provisions and the sources from which they may be drawn set forth in Point III (pp. 23-25, *supra*). These classes, so far as we are now concerned with them, are:

1. Those provisions which merely affect the framework and machinery of the government, which (except as they involve the creation of an indissoluble nation and the exercise of direct powers over the people) are within the competence of the States in their corporate capacities.

2. Those rights which are exercised by the States in their corporate capacity and the surrender of which may be made by the States as such.

3. Provisions which safeguard the people from usurpation of power and tyranny on the part of the national government and which involve a restriction and not a grant of power over the people, may be adopted by the legislatures.

4. Those provisions which delegate added power to the national government to operate directly upon the people themselves and upon their individual rights and property can be delegated only by the people themselves.

As to the first ten amendments there is of course, no question; none of them seek to confer added powers over the people (*U. S. v. Cruickshank*, 92 U. S. 542). On the contrary they are all restrictions on the National Government. Hence they were adequately adopted by the legislatures. They were, moreover, the direct outcome of protests made by the State conventions and resulted from the promises made to secure ratification, that the Constitution would be immediately amended to add these safeguards.

The Eleventh Amendment is a surrender by the National Government to the States of a part of its judicial power.

The Twelfth Amendment deals only with methods of procedure of the Electoral College—it relates to the mechanics of government.

The Fourteenth Amendment deals variously with the machinery of government and with the surrender by the States of certain of their powers, similar in character to those which had been surrendered in the Articles of Confederation, and in Section 10 of Article 1 of the original Constitution. As to those there can be no question of the competency of the legislatures.

The Fifteenth and Nineteenth Amendments deal not with new governmental powers over the people, but purely with the franchise. At most they present a question of State Rights which the States through the legislatures were competent at all times to surrender.

Political liberty consists in the possession of rights by the citizen which he can compel the government to respect, and

of which he cannot be deprived. The right is a shield from government interference. The franchise is, on the contrary, a power to interfere in the government. One may possess all his personal rights without having the vote. A citizen removes from one State to another. All his *rights* remain. His *franchise* only, has been interrupted.

But to discriminate in the voting power on grounds of color or sex, is to create an inequality—counter to the pervading spirit of our institutions. The removal of the possibility of such a discrimination by the government of any State does not give to the national government an added power over the rights of the people. Waiver of any possible right of the States to make discriminations, on grounds of color or sex, is within the scope of power of the States, as such, and therefore may be approved by the legislatures.

The Seventeenth Amendment was a surrender by each State to the people thereof of the right to elect its representatives in the United States Senate. This right, of course, the legislatures were competent to give back to the people.

We turn now to the Thirteenth and Sixteenth Amendments as to which alone argument is made that they are like in character to the Eighteenth and must stand or fall with it. We cannot understand this insistence because the most cursory analysis in the light of historical fact shows clearly that neither attempted or purported to grant additional direct powers to the United States over the people.

As to the Thirteenth Amendment, the idea that this freed the slaves, so taking away property, lies at the root of the contention. As a matter of historical fact the slaves had been set free in the chief slave states by the Emancipation Proclamation enforced by armies of the United States as a war measure. And, before the submission of the Thirteenth Amendment, every state, save only Delaware and Kentucky had abolished slavery by State constitutional provision. And even in those two States slavery was practically dead; the war had settled it. No one was more definite in his statement that the Thirteenth Amendment was not needed to free

the slaves than the prime author of the Amendment one of the greatest of our Constitutional lawyers, Abraham Lincoln.

As to Kentucky and Delaware, the question is purely academic. In 1891 Kentucky adopted an Anti-Slavery clause in its own Constitution practically identical with the Thirteenth Amendment.

In Delaware there were but 1798 slaves in 1860, and between that year and 1865 most of these had been purchased by the United States government and set free. (5 Rhodes History of the United States, 49 Congressional Globe 1864-1865, p. 242.) Such few slaves as remained had no substantial value as property. In the main they were old men and women, family retainers, whom it was a greater kindness to keep in their old homes than to turn loose on the world. The Governor of Delaware himself asked what was the value of a slave there, who if he but set foot outside the boundary of that tiny commonwealth instantly became free.

Hence the purpose and scope of the Thirteenth Amendment was not a destruction of property rights of individuals. In the great Anti-Slavery debates and in those over the Thirteenth Amendment nothing had been made more clear than that slavery existed anywhere solely by virtue of affirmative legislation of the State. Ownership of slaves was not a natural right, but a creature of affirmative State law. The Thirteenth Amendment was purely a surrender of power of the States to re-establish or maintain the domestic relation of slavery. (2 Curtis Constitutional History, p. 161, Note 15.) Hence it is within our second class of amendments which the States or the legislatures were competent to approve, without reference to the people, because it merely surrendered powers of the States.

As to the Sixteenth (Income Tax) Amendment, the case is also clear. The power of the National Government to levy income taxes had existed from the original adoption of the Constitution.

The question dealt with by the Sixteenth Amendment was simply whether an income tax was thereafter to be considered a "*direct tax*" within the meaning of that term as used in the Constitution, and as such to be apportioned among the several States in proportion to their respective populations.

In case after case definitions of "direct taxes" had previously been given, which would not include income taxes and these had been generally accepted.

> *Hylton* v. *U. S.*, 3 Dall. 171;
> *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 446;
> *Veazie Bank* v. *Fenno*, 8 Wall. 533;
> *Scholey* v. *Rew*, 23 Wall. 331;
> *Springer* v. *U. S.*, 102 U. S. 586.
> See also other authorities cited in the dissenting opinions of Justices Harlan, Brown, Jackson and White, 158 U. S. 638-715.

But the phrase "direct tax" seemed in the course of a century to have attained a new meaning in the view of five of the Justices of the Supreme Court. On the first hearing of the case in 1894, the Court was divided on the question whether an income tax (except on rents) was a "direct tax" within the meaning of the Constitution.

> *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 586.

Upon a rearguument of that case the Court held, five to four, that *any* income tax was a "direct" tax, and had to be so apportioned.

> *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601.

Amendment XVI was passed simply to overcome *that* ruling.

It seems clear that this privilege of apportionment between the States was a matter of *State* privilege, and not a matter

of *individual rights* of citizens of the United States. As such it lay within the power of the States to surrender their special privilege of apportionment.

Strong argument had been made that in the original meaning of the Constitution an income tax was a form of *excise* tax and not a "direct tax", and it may well be urged that the Amendment was passed merely to restore the original construction of the instrument, and, for that reason also, gave no new power to the National Government.

Thus, no other Amendment than the Eighteenth has given occasion to consider this question of *where*, since the adoption of the Tenth Amendment, *has lain the power and authority* to confer *additional powers* on the National Government *over the people or their individual rights*, or presented the question of the reserved "powers" of the people, or of their reservation to them.

POINT XIV.

The question of power now presented has not been argued to or considered by this Court. It has been passed *sub silentio* in all previous cases dealing with the XVIII Amendment. And they do not conclude this question.

There are but three cases where, it might be claimed, that this Court has in any way passed upon the points which we have presented, i. e., the meaning of the Congressional selection and legislative adoption clauses of the V Article, and the purpose and effect of the X Amendment.

These points were not presented to the Court, nor argued before it in any of those cases; and the language of the opinions, though it may appear to be broad enough to cover these points, is in fact directed to wholly different arguments and considerations, and in each case passes these points *sub silentio.*

We take up the three cases mentioned above:

1. *Hawke* vs. *Smith,* (No. 1) 253 U. S. 221.

In this case, the plaintiff sought an injunction to enjoin the Secretary of State of Ohio from proceeding with the submission, by referendum, to the electors of Ohio, of the question of the ratification of the XVIII Amendment.

In its opinion, this Court said:

> "The method of ratification is left to the choice of Con-"gress. Both methods of ratification, by legislatures or "conventions, call for action by deliberative assemblages "representative of the people, which it was assumed "would voice the will of the people.
>
> "The V Article is a grant of authority by the people "to Congress. The determination of the method of rati-"fication is the exercise of the National power specifically

"granted by the Constitution; that power is conferred "upon Congress, and is limited to two methods."

The framers, says the Court, might have adopted a different method, and left ratification to a vote of the people, but the "language of the Article is plain, and admits of no doubt in its interpretation."

This language appears, of course, to be opposed to the propositions which we advance. *But the statement is a mere dictum made by the Court arguendo.*

The *real* issue in that case, the only one argued, and the *only* one which was there *decided*, appears in the opinion itself:

> "The question for our consideration is: whether the "provision of the Ohio Constitution adopted at the gen- "eral election, November, 1918, extending the referen- "dum to the ratification by the General Assembly of pro- "posed amendments to the Federal Constitution, is in "conflict with Article V of the Constitution of the United "States.
>
> "The only question really for determination is:—what "did the framers of the Constitution mean in requiring "ratification by 'legislatures'?"

The decision was that the term "legislatures" in Article V meant the legislative assembly in each State, and did not include a *referendum* to the vote of the people.

In no respect was there presented to the court any claim, contention or argument that the discretion of Congress, to select legislatures or conventions as the agencies of ratification, or the power of legislatures to adopt amendments, was limited either by the Fifth Article as we contend it should be construed, or by the provisions of the X Amendment. Neither of these questions is even hinted at in the opinion. The X Amendment is not even mentioned and the case is, at the utmost, a construction of Article V as originally adopted, and without noticing that its provisions had been clarified and taken without any reference to the contention which we urge that such article is controlled by the X Amendment.

2. *National Prohibition Cases*, 253 U. S. 350.

In these cases, the Court did not hand down an ordinary opinion, but merely certain conclusions.

Of these but one has any bearing here.

The Court said:

> "That amendment by lawful proposal and ratification "has become a part of the Constitution, and must be re- "spected and given effect the same as other provisions of "that instrument".

The vital changes in the X Amendment and their effect on its meaning seem to have passed unnoticed by anyone in the *National Prohibition Cases*. No one made any point of the reservation "to the people". All wholly failed to notice the corrections of Carroll and of Roger Sherman. They failed to observe that the first Nine Amendments dealt with *rights*, and the X exclusively with *"powers"*, and expressly with the *powers "not delegated to the United States"*. Nor did they apparently advance the controlling force of the general intent as affecting the provisions of Article V.

3. *Dillon* vs. *Gloss*, 256 U. S. 368.

In this case the only language at all applicable is the statement in the opinion (p. 374) that it is

> "a condition to amending that instrument that the "amendment be submitted to representative assemblies "in the several states and be ratified in three-fourths of "them. The plain meaning of this is that (a) all amend- "ments must have the sanction of the people of the "United States, the original fountain of power, acting "through representative assemblies, and (b) that rati- "fication by these assemblies in three-fourths of the states "shall be taken as a decisive expression of the people's "will and be binding on all."

The statement is but a dictum since the sole issue was whether or not the seven-year clause in the proposed Amendment was valid. This question is not touched in the above phrases.

That opinion declares that all amendments must have the sanction of the people of the United States, the original fountain of power. It suggested, however, that the sanction of the people may be obtained either through legislatures or conventions. In making this suggestion, which was but a dictum, the court obviously overlooked the whole political philisophy of the period of adoption, expressed in debates on and in the passage of the resolution for ratification by conventions and not legislatures, the House resolution governing the form of the first ten amendments, the debates in the state conventions and the clear declarations, as in *McCulloch* vs. *Maryland*, that the legislatures did not represent the people for any such purpose, and that the *only* manner in which the people could act on such a subject was by assembling in conventions in their several states.

The dictum, in *Dillon* v. *Glass*, cutting both ways seems wholly inconclusive.

Counsel for the appellant have suggested certain clauses in various papers in the National Prohibition cases as raising the questions we raise.

Even taken by themselves apart from their context they fail to do so.

Counsel for appellant conceds that these questions were not raised in either *Hawke* v. *Smith* or in *Dillon* v. *Glass*. They place their contentions on the briefs in the *National Prohibition Cases*, *Rhode Island* v. *Palmer*, No. 29 Original, and the bill of complaint in *New Jersey* v. *Palmer*, No. 30 Original.

These are suits by *States*, asserting *State Rights*.

We stand not on State Rights, but on the rights and powers of *"the People."* So we start from a fundamentally different standpoint and are contending for a fundamentally different thing.

The contention of the complainant on the motion to dismiss in *Rhode Island* v. *Palmer*, quoted by appellant, was that the legislature of a State cannot relinquish *the State's sovereign powers*.

Our contention is that neither States nor legislatures can grant away the powers *"reserved to the people"*.

The passage quoted from the brief of Mr. Root, on pages 19-20 of the appellant's brief points out that the adoption by legislatures gives no opportunity to express the will of the people, and that the legislatures acted "solely in the alleged "exercise of the agency or authority granted the State legisla- "tures by Article V of the Constitution more than a century "ago. In some States the action of the State legislature was "in express violation of the commands of the people of the "State".

We find in this no suggestion of the considerations that we are urging.

The brief of Messrs. Lincoln and Lynch is founded on the principle that an amendment granting new and additional powers is not an "amendment", within the true meaning of that word.

They, too, make no suggestion of the contentions we advance.

The allegations of the bill in *New Jersey* v. *Palmer* (appellant's brief, pp. 21-22) do say that the proposal was submitted in the manner provided in Article V "in the alleged exercise of a special power conferred by that article contrary to the true intent and meaning thereof."

It does not appear that they meant by this allegation anything more than the contention that the grant of an added power was not an "amendment" but an infringement of States rights. The rulings of this Court in the *National Prohibition Cases* would seem to indicate that this was the meaning which this Court attached to that allegation; and it is all that counsel in the case seemed to attach to it.

Nor can we believe that this Court consciously passed on the question what powers were "reserved to the people" by the X. Amendment, without some expression concerning the most fundamental question of constitutional law that has been presented since *Marbury* v. *Madison*, or reversed with-

out a word of remark the uniform rulings of the Court from *Chisolm* vs. *Georgia* in 1792, to *Kansas* vs. *Colorado* in 1906.

The more one studies the briefs in those cases and compares them with what we submit, the clearer it becomes that the contentions we advance were not advanced there.

The supreme point of the ultimate sovereign power and its deliberate reservation "to the people" was passed *sub silento* by both court and counsel. This Court, when the question is finally raised and argued does not consider itself bound by such a decision.

United States v. *Moor*, 3 Cranch. 159;
Cross v. *Burke*, 146 U. S. 86-87;
United States v. *Sanges*, 144 U. S. 310, 319.

Related Miscellaneous Contentions of Appellant.

The appellant's quotation from Elbridge Gerry lacks weight when one remembers that he, alone of the New England delegates to the Constitutional Convention of 1787, refused to sign it. He throughout misunderstood its purport and its terms.

That from Hamilton (Federalist Cap. 85) is from an article dealing with further restrictions on the government's powers; his views on the subject of conferring additional powers on the government over the people and their rights he had given in Cap. 84 of the Federalist, quoted above on page 41.

Hamilton, thus, in these two articles of the Federalist was drawing the same distinction that we draw between amendments conferring added powers over the people, which they alone could adopt, and amendments of other descriptions which legislatures could adopt.

Of certain other historical contentions made by the appellant we may speak briefly.

Vermont was not one of the original Thirteen. And it is moreover not correct to say that the legislature adopted the Vermont Constitution. There was no legislature till there

was a Constitution. The body which appellant refers to was like the English Grand Convention of 1688, which was not a Parliament, nor ever recognized as such, and which declared the throne vacant, making the English Revolution.

Similarly the bodies in Virginia and South Carolina which adopted their Constitutions were not legislatures, nor did they exercise the power of legislatures in so doing. They claimed to be, and time showed the correctness of that claim, the representatives of the people acting as a Congress or Convention of the people exercising powers never possessed by the Colonial Legislatures.

The resolutions of the National Constitutional Convention of 1787, the declarations of Marshall in *McCulloch* vs. *Maryland*, and the other supreme authorities cited in Point II answer these suggestions of appellant conclusively.

In *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429, Chief Justice Fuller wrote, pronouncing the opinion of the Court:

> "We proceed then to examine certain decisions of this "court under the acts of 1861 and following years, in "which it is claimed that this court has heretofore ad- "judicated that taxes like those under consideration are "not direct taxes and subject to the rule of apportion- "ment, and that we are bound to accept the rulings thus "asserted to have been made as conclusive in the prem- "ises. Is this contention well founded as respects the "question now under examination? Doubtless the doc- "trine of *stare decisis* is a salutary one, and to be ad- "hered to on all proper occasions, *but it only arises in "respect of decisions directly upon the points in issue.*"

Justice Fuller then discussed the decisions in *Cohens* v. *Virginia*, 6 Wheat. 264, in *Carroll* v. *Lessee of Carroll*, 16 How. 275, in *The Genesee Chief*, 12 How. 443, and *Orleans* v. *Phoebus*, 11 Pet. 175, dealing with this question, and concluded:

> "Manifestly, as this court is clothed with the power, "and entrusted with the duty, to maintain the funda-

"mental law of the Constitution, the discharge of that "duty requires it not to extend any decision upon a con- "stitutional question if it is convinced that error in prin- "ciple might supervene."

It is what the court has investigated with care and considered in its fullest extent. It is the precise question to which there has been an application of the judicial mind. It is a decision made when the great importance of the question presented is seen and the subject has received that deliberate consideration to which it was entitled. These are the features that lie back of the doctrine of *stare decisis.*

For this, we have the opinions, quoted by Chief Justice Fuller, of Marshall, of Curtis and of Taney, and the opinion of Chief Justice Fuller himself.

In the following cases in this Court has held that it does not feel itself found by its prior formal decisions where a question though adjudicated has in fact been passed on only *sub silentio.*

United States vs. *More,* 3 Cranch 159;
United States vs. *Sanges,* 144 U. S. 310, 319;
Cross vs. *Burke,* 146 U. S. 82.

POINT XV.

Of the Opinion of the Court Below.

We are deeply indebted to the Trial Judge for the learning and scholarship shown in his opinion, and we have borrowed freely from the authorities to which he refers.

We think, however, that in certain particulars he misapprehended the argument presented, and we call attention to this fact lest we again be misunderstood. Apparently the learned court supposed that we conceded the literal interpretation of the Fifth Article of the Constitution and that considering that article alone, Congress had the absolute option to select legislatures or conventions as the agents of ratification for amendments. He said, for example:

> "Any express limitation of the language of article 5 "must be sought in some reservation. The only de- "feasance in the grant of the Constitution is found in the "tenth amendment. Counsel have placed the two provi- "sions in combination and have argued that the result "justifies their thesis that any amendment granting gov- "ernmental powers over the people to the United States "must be submitted to conventions, instead of to State "legislatures" (R. p. 17).

After holding that neither legislatures nor conventions could be deemed the only authorized representatives of the people, he proceeded:

> "We must reject, therefore, counsel's argument, based "on their combination and subsequent interpretation of "article 5 and the 10th amendment. We give, however, "full weight to their development of the tacit assump- "tions drawn from both the historical and theoretical "nature of our Federal system, although our development "thereof does not altogether parallel that of their briefs" (R. p. 21).

Our argument to the Trial Judge in fact involved the same sequence that we now present. We asserted that the history of Article 5 and of the conventions and debates showed that

by itself Article V was never intended to confer this arbitrary option upon Congress. Then we argued that this view was confirmed by the Constitution as a whole and particularly by the language of the Tenth Amendment; and that had there been any doubt as to its meaning, the Tenth Amendment clarified and, if necessary, superseded the provisions of Article V. The learned Judge, from the quotations given, appears to have recognized only the third part of that argument, but in reaching his decision it is most striking that he should have come to the same conclusion as we did as to the meaning of Article V, though by a different route. He departed from what he called the "stereotyped" method of construction, whereas we proceeded along that line, construing the language of the article in the light of the dominant purpose and intent as shown by the debates, the surrounding circumstances, and political philosophy which animated the Constitution as a whole and which was expressly declared in the Preamble. Every authority referred to by the learned Judge makes stronger our own interpretation.

The government refers in its brief (pp. 8-9) more or less slightingly to paragraphs in the opinion of the court below in which the court refers to policital science and scientific approach to the problems of government. This court has frequently made reference to Montesquieu and Lecky and other writers with whom the framers of the Constitution were more familiar than most lawyers of today. And this court has never hesitated to appeal for aid to political science or philosophy in arriving at its determinations. The scholarly Judge below has shown remarkable familiarity with the writers on the subject. But the framers of the Constitution were familiar with this philosophy; in fact it was the dominating influence in the making of the Constitution. The words they used are, therefore, to be interpreted in the light of the learning and philosophy which actuated their judgment. It forms an ineradicable part of Constitutional history of our country. It is a true index to an understanding of the Constitution itself and may properly be used in any lawyer-like presenta-

tion of the subject. It makes no difference whether the method be called "stereotyped" or "scientific". It is in either case a fitting method of approach to great questions of Constitutional interpretation (see argument of Jeremiah Black in *Ex Parte* Milligan—American Trials, *Ex Parte*: In the Matter of Lambdon P. Milligan, edited by Samuel Klaus).

The wisdom and soundness of our construction of Article V, which we assert is compelled by the sheer force of what the framers and adopters thought *and said*, stands up under the test of modern thinking in the field of political science. This is the thesis of the opinion below. That this thinking maintains its pristine strength under the sharp criticism of modern thought is but additional tribute to the vision of the founders of the Constitution. To seek the summation of this modern thought, it is unnecessary to go beyond the bounds of the opinion of the court below.

In one respect, however, we dissent from the declaration of the lower court. This is summarized in the language of the opinion:

> "We can not, however, follow the argument that a con-
> "vention is more within the definition of the people than
> "a State legislature. * * *
>
> "At any rate, both the convention, the special agent,
> "and the legislature, the general agent, are clearly but
> "different manifestations of the machinery of represen-
> "tation required by the inconvenience of direct action.
> "* * *
>
> "We have never before heard it contended that either
> "one or the other is 'the people'. It would be most extra-
> "ordinary, therefore, to argue that one shou'd and the
> "other should not be so classified" (R. pp. 19-20).

We deem it well established and beyond controversy that in the minds of those who framed and adopted the Constitution this precise distinction existed, and that so far as ratification and amendments of the Constitution is concerned, conventions *are* the people, and legislatures are not, but are representative of the states. Authority for this view has been set forth at length in Points IV and XI.

POINT XVI.

The contentions we present are of fundamental constitutional importance. The Eighteenth Amendment is merely the incident that presents the basic question of the control of the liberties of the people, and the powers expressly reserved, to them by the Tenth Amendment.

CONCLUSION.

As the Eighteenth Amendment has never been adopted by the people, to whom alone was reserved the power to grant any such additional powers over themselves or their rights to the National Government, Congress had no power to enact or enforce the statutory provisions under which this indictment is framed. The provisions of the act on which the indictment is predicated are therefore unconstitutional. Consequently no crime against the United States is charged by the indictment.

The judgment quashing the indictment must, therefore, be affirmed.

The X Amendment, as pointed out by Justice Brewer in *Turner* v. *Williams*, 194 U. S. 279, 295-296, has received too little attention. The framers of that amendment, as he said in *Kansas* v. *Colorado*, intended "that if in the future further powers seemed necessary, they should be "*granted by the* "*people* in the manner they had provided for amending that act," and he added:

> "The powers not delegated to the United States by the "Constitution, nor prohibited by it to the States, are "reserved to the States respectively, or to the people. "The argument of counsel ignores the principal factor in "this article, to wit, 'the people'. Its principal purpose

"was not the distribution of power between the United "States and the States, but a reservation to the people "of all powers not granted. * * * And all powers of a "national character which are not delegated to the "National Government by the Constitution are reserved "to the people of the United States."

Kansas v. *Colorado*, 206 U. S. 46, 89-90.

The question is, is this to be a government *by the people*, or a government by legislators despite the people? On that point no higher statement can be made than that of Abraham Lincoln at Gettysburg, and his plea:

"That we here highly resolve that these dead shall not "have died in vain, that this Nation, under God, shall "have a new birth of freedom and that Government of "the people, by the people, for the people, shall not perish "from the earth."

To declare this free government of the people, by the people, for the people, to be within the unlimited control of an unrestrainable oligarchy, with absolute despotic power to change its every feature vested in the hands of a few men—is Revolution.

In the words of Marshall:

"The people made the Constitution, and the people "can unmake it. It is the creature of their will, and "lives only by their will. But this supreme and "irresistible power to make or unmake, resides only in "the whole body of the people; not in any subdivision "of them. The attempt of any of the parts to exercise "it is usurpation, and ought to be repelled by those to "whom the people have delegated their power of re-"pelling it."

Cohens vs. *Virginia*, 6 Wheat. 264, 389.

In a government of the people, by the people, for the people, additional grants of power can spring only from the people.

Such was the law as declared by this Court from *Chisolm* vs. *Georgia*, in 1792, to *Kansas* vs. *Colorado*, in 1906.

This was a great free nation, where the sovereignty resided in the people alone. Is it henceforth to be controllable by an oligarchy possessed of absolute and despotic power, and the reservation of powers to the people in the Constitution to be held meaningless?

That is the issue here presented.

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APPENDIX A.

Amendments to the Constitution.

ARTICLE XIII.

"SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation."

ARTICLE XVI.

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

ARTICLE XIX.

"The right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation."

APPENDIX B.

Excerpts from Elliot's Debates on the Federal Constitution, Vol. V.

Pp. 126-132—Tuesday, May 29, 1787.

Mr. RANDOLPH then opened the main business:

* * * * * * *

1. The character of such a government ought to secure, first, against foreign invasion; secondly, against dissentions between members of the Union, or seditions in particular states; thirdly, to procure to the several states various blessings, of which an isolated situation was incapable; fourthly, it should be able to defend itself against encroachment; and fifthly, to be paramount to the state constitutions.

* * * * * * *

He then proceeded to enumerate the defects:

* * * * * * *

Thirdly, that there were many advantages which the United States might acquire, which were not attainable under the Confederation; such as productive imposts, counteraction of the commercial regulations of other nations, pushing of commerce ad libitum, &c., &c.

Fourthly, that the federal government could not defend itself against encroachments from the states.

Fifthly, that it was not even paramount to the state constitutions, ratified as it was in many of the states.

* * * * * * *

He proposed, as conformable to his ideas, the following resolutions, which he explained one by one.

"1. Resolved, that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, 'common defence, security of liberty, and general welfare.'"

* * * * * * *

"13. Resolved, that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the national legislature ought not to be required thereto.

* * * * * * *

"15. Resolved, that the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people, to consider and decide thereon."

* * * * * * *

Mr. CHARLES PINCKNEY laid before the House the draft of a federal government which he had prepared, to be agreed upon between the free and independent States of America:

* * * * * * *

"ART. XVI. If two thirds of the legislatures of the states apply for the same, the legislature of the United States shall call a convention for the purpose of amending the Constitution; or, should Congress, with the consent of two thirds of each House, propose to the states amendments to the same, the agreement of two thirds of the legislatures of the states shall be sufficient to make the said amendments parts of the Constitution."

Pp. 157-158—Tuesday, June 5, 1787.

The thirteenth resolution, to the effect *that provision ought to be made for hereafter amending the system now to be established, without requiring the assent of the national legislature*, being taken up.

Mr. PINCKNEY doubted the propriety or necessity of it.

Mr. GERRY favored it. The novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the government. Nothing had yet happened in the state where this provision existed to prove its impropriety. The proposition was postponed for further consideration, the votes being,—

Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Maryland, North Carolina, ay 7; Virginia, South Carolina, Georgia, no, 3.

* * * * * * *

The fifteenth resolution, *for recommending conventions under appointment of the people, to ratify the new Constitution, &c.* being taken up,

Mr. SHERMAN thought such a popular ratification unnecessary; the Articles of Confederation providing for changes and alterations, with the assent of Congress, and ratification of state legislatures.

Mr. MADISON thought this provision essential. The Articles of Confederation themselves were defective in this respect, resting, in many of the states, on the legislative sanction only. Hence, in conflicts between acts of the states and of Congress, especially where the former are of posterior date, and the decision is to be made by state tribunals, an uncertainty must necessarily prevail; or rather, perhaps, a certain decision in favor of the state authority. He suggested also that, as far as the Articles of Union were to be considered as a treaty only, of a particular sort, among the governments of independent states, the doctrine might be set up that a breach of any one article, by any of the parties, absolved the other parties from the whole obligation. For these reasons, as well as others, he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves.

MR. GERRY observed, that in the Eastern States the Confederation had been sanctioned by the people themselves. He seemed afraid of referring the new system to them. The people in that quarter have at this time the wildest ideas of government in the world. They were for abolishing the Senate in Massachusetts, and giving all the other powers of government to the other branch of the legislature.

MR. KING supposed, that the last article of the Confederation rendered the legislature competent to the ratification. The people of the Southern States, where the Federal Articles

had been ratified by the legislatures, only, had since, *impliedly*, given their sanction to it. He thought, notwithstanding, that there might be policy in varying the mode. A convention being a single House, the adoption may more easily be carried through it, than through the legislatures, where there are several branches. The legislatures, also, being to lose power, will be most likely to raise objections. The people having already parted with the necessary powers, it is immaterial to them by which government they are possessed, provided they be well employed.

Mr. WILSON, took this occasion to lead the committee, by a train of observation, to the idea of not suffering a disposition, in the plurality of states, to confederate anew on better principles, to be defeated by the inconsiderate or selfish opposition of a few states. He hoped the provision for ratifying would be put on such a footing as to admit of such a partial union, with a door open for the accession of the rest.

Mr. PINCKNEY hoped that, in case the experiment should not unanimously take place, nine states might be authorized to unite under the same government.

The fifteenth resolution was postponed, *nem con.*

Pp. 182-183—Monday, June 11, 1787.

The thirteenth resolution, for amending the national Constitution, hereafter, without consent of the national legislature, being considered, several members did not see the necessity of the resolution at all, nor the propriety of making the consent of the national legislature unnecessary.

Col. MASON urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to chance and violence. It would be improper to require the consent of the national legislature, because they may abuse their power, and refuse their assent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendment.

Mr. RANDOLPH enforced these arguments.

The words "without requiring the consent of the national legislature" were postponed. The other provision in the clause passed, *nem con.*

* * * * * * *

P. 183—Tuesday, June 12, 1787.

In Committee of the Whole.—The question was taken on the fifteenth resolution, to wit, referring the new system to the people of the United States for ratification. It passed in the affirmative.

> Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, ay, 6; Connecticut, New York, New Jersey, no, 3; Delaware, Maryland, divided. (Pennsylvania omitted in the printed Journal. The vote is there entered as of June 11.)

Pp. 189-190—Wednesday, June 13, 1787.

The committee rose, and Mr. GORHAM made report, which was postponed till tomorrow, to give an opportunity for other plans to be proposed: the report was in the words following:—

* * * * * * *

> 17. Resolved, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.
>
> * * * * * * *
>
> 19. Resolved, That the amendments which shall be offered to the Confederation by the Convention, ought, at a proper time or times after the approbation of Congress, to be submitted to an assembly or assemblies recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon.

P. 195—Saturday, June 16, 1787.

Mr. WILSON entered into a contract of the principal points of the two plans, so far, he said, as there had been time to examine the one last proposed. These points were,—1. In the Virginia plan * * *

13. Finally, the ratification is, in this, to be by the people themselves; in that, by the legislative authorities, according to the thirteenth Article of the Confederation.

Hamilton, p. 199—Monday, June 18, 1787.

"It may be said, that the *states* cannot ratify a plan not within the purview of the Articles of the Confederation providing for alterations and amendments.

But may not the states themselves, in which no constitutional authority equal to this purpose exists in the legislatures, have had in view a reference to the people at large?"

Pp. 352-356—Monday, July 23, 1787.

The nineteenth resolution, referring the new Constitution to assemblies to be chosen by the people, for the express purpose of ratifying it, was next taken into consideration.

Mr. ELLSWORTH moved that it be referred to the legislatures of the states for ratification. Mr. PATTERSON seconded the motion.

Col. MASON considered a reference of the plan to the authority of the people as one of the most important and essential of the resolutions. The legislatures have no power to ratify it. They are the mere creatures of the state constitutions, and cannot be greater than their creators. And he knew of no power in any of the constitutions—he knew there was no power in some of them—that could be competent to this object. Whither, then, must we resort? To the people, with whom all power remains that has not been given up in the constitutions derived from them? It was of great moment, he observed, that this doctrine should be cherished as the basis of free government. Another strong reason was, that, admitting the legislatures to have competent authority, it would be wrong to refer the plan to them, because succeeding legislatures, having equal authority, could undo the acts of their predecessors; and the national government would stand, in each state, on the weak and tottering foundation

of an act of assembly. There was a remaining consideration of some weight. In some of the states the governments were not derived from the clear and undisputed authority of the people. This was the case in Virginia. Some of the best and wisest citizens considered the constitution as established by an assumed authority. A national constitution derived from such a source would be exposed to the severest criticisms.

Mr. RANDOLPH: One idea has pervaded all our proceedings, to wit, that opposition as well from the states as from individuals will be made to the system to be proposed. Will it not then be highly imprudent to furnish any unnecessary pretext by the mode of ratifying it? Added to other objections against a ratification by the legislative authority only, it may be remarked, that there have been instances in which the authority of the common law has been set up in particular states against that of the Confederation, which has had no higher sanction than legislative ratification. Whose opposition will be most likely to be excited against the system? That of the local demagogues who will be degraded by it from the importance they now hold. These will spare no efforts to impede that progress in the popular mind which will be necessary for the adoption of the plan, and which every member will find to have taken place in his own, if he will compare his present opinions with those he brought with him into the Convention. It is of great importance, therefore, that the consideration of this subject should be transferred from the legislatures, where this class of men have their full influence, to a field in which their efforts can be less mischievous. It is moreover worthy of consideration, that some of the states are averse to any change in their constitution, and will not take the requisite steps, unless expressly called upon, to refer the question to the people.

Mr. GERRY: The arguments of Col. Mason and Mr. Randolph prove too much. They prove an unconstitutionality in the present federal system, and even in some of the state

governments. Inferences drawn from such a source must be inadmissible. Both the state governments and the federal government have been too long acquiesced in to be now shaken. He considered the Confederation to be paramount to any state constitution. The last article of it, authorizing alterations, must consequently be so as well as the others: and everything done in pursuance of the article must have the same high authority with the article. Great confusion, he was confident, would result from a recurrence to the people. They would never agree on anything. He could not see any ground to suppose that the people will do what their rulers will not. The rulers will either conform to or influence the sense of the people.

Mr. GORHAM was against referring the plan to the legislatures. 1. Men chosen by the people for the particular purpose will discuss the subject more candidly than members of the legislature, who are to lose the power which is to be given up to the general government. 2. Some of the legislatures are composed of several branches. It will consequently be more difficult, in these cases, to get the plan through the legislatures than through a convention. 3. In the states many of the ablest men are excluded from the legislatures, but may be elected to a convention. Among those may be ranked many of the clergy, who are generally friends to good government. Their services were found to be valuable in the formation and establishment of the constitution of Massachusetts. 4. The legislatures will be interrupted with a variety of little business; by artfully pressing which designing men will find means to delay from year to year, if not to frustrate altogether, the national system. 5. If the last article of the Confederation is to be pursued, the unanimous concurrence of the states will be necessary. But will anyone say that all the states are to suffer themselves to be ruined if Rhode Island should persist in her opposition to general measures? Some other states might also tread in her steps. The present advantage, which New York seems to be so much attached to, of taxing her neighbors by

the regulation of her trade, makes it very probable that she will be of the number. It would, therefore, deserve serious consideration whether provision ought not to be made for giving effect to the system without waiting for the unanimous concurrence of the states.

Mr. Ellsworth: If there be any legislatures who should find themselves incompetent to the ratification, he should be content to let them advise with their constituents, and pursue such a mode as would be competent. He thought more was to be expected from the legislatures than from the people. The prevailing wish of the people in Eastern States is, to get rid of the public debt; and the idea of strengthening the national government carries with it that of strengthening the public debt. It was said by Col. Mason, in the first place, that the legislatures have no authority in this case; and in the second, that their successors, having equal authority, could rescind their acts. As to the second point, he could not admit it to be well founded. An act to which the states, by their legislatures, make themselves parties, becomes a compact from which no one of the parties can recede of itself. As to the first point, he observed that a new set of ideas seemed to have crept in since the Articles of Confederation were established. Conventions of the people, or with power derived expressly from the people, were not then thought of. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint. To whom have Congress applied on subsequent occasions for further powers? To the legislatures, not to the people. The fact is, that we exist at present, and we need not inquire how, as a federal society, united by a charter, one article of which is, that alterations therein may be made by the legislative authority of the states. It has been said, that, if the Confederation is to be observed, the states must *unanimously* concur in the proposed innovations. He would answer, that, if such were the urgency and necessity of our situation as to warrant a new compact among a part of the states, founded on the consent of the people, the same pleas

would be equally valid in favor of a partial compact, founded on the consent of the legislatures.

Mr. WILLIAMSON thought the resolution (the nineteenth) so expressed as that it might be submitted either to the legislatures or to conventions recommended by the legislatures. He observed that some legislatures were evidently unauthorized to ratify the system. He thought, too, that conventions were to be preferred, as more likely to be composed of the ablest men in the states.

Mr. GOUVERNEUR MORRIS considered the inference of Mr. Ellsworth from the plea of necessity, as applied to the establishment of a new system on the consent of the people of a part of the states, in favor of a like establishment on the consent of a part of the legislatures, as a *non sequitur*. If the Confederation is to be pursued, no alteration can be made without the unanimous consent of the legislatures. Legislative alterations not conformable to the federal compact would clearly not be valid. The judges would consider them as null and void. Whereas, in case of an appeal to the people of the United States, the supreme authority, the federal compact may be altered by a *majority of them*, in like manner as the constitution of a particular state may be altered by a majority of the people of the state. The amendment moved by Mr. Ellsworth erroneously supposes that we are proceeding on the basis of the Confederation. This Convention is unknown to the Confederation.

Mr. KING thought with Mr. Ellsworth that the legislatures had a competent authority, the acquiescence of the people of America in the Confederation being equivalent to a formal ratification by the people. He thought with Mr. Ellsworth, also, that the plea of necessity was as valid in the one case as the other. At the same time, he preferred a reference to the authority of the people, expressly delegated to conventions, as the most certain means of obviating all disputes and doubts concerning the legitimacy of the new Constitution, as well as the most likely means of drawing forth the best men in the states to decide on it. He remarked, that,

among other objections made in the state of New York to granting powers to Congress, one had been, that such powers as would operate within the states could not be reconciled to the Constitution, and therefore were not grantable by the legislative authority. He considered it as of some consequence, also, to get rid of the scruples which some members of the state legislatures might derive from their oaths to support and maintain the existing constitutions.

Mr. MADISON thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions; and it would be a novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union which had given a power to the legislature to concur in alterations of the federal compact. But there were certainly some which had not; and, in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty* and a *constitution*. The former, in point of *moral obligation*, might be as inviolable as the latter. In point of *political operation* there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes, in point of expediency, he thought all the considerations which recommended this Convention, in preference to Congress, for proposing the reform, were in

favor of state conventions, in preference to the legislatures, for examining and adopting it.

On the question on Mr. Ellsworth's motion to refer the plan to the legislatures of the states:

> Connecticut, Delaware, Maryland—aye, 3; New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia—no, 7.

Mr. GOUVERNEUR MORRIS moved that the reference of the plan be made to one general convention, chosen and authorized by the people, to consider, *amend* and establish the same. Not seconded.

On the question for agreeing to the nineteenth resolution, touching the mode of ratification as reported from the committee of the whole, viz., to refer the Constitution, after the approbation of Congress, to assemblies chosen by the people:

> New Hampshire, Massachusetts, Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia—aye, 9; Delaware—no, 1 (pp. 352-356).

Pp. 374-376—Thursday, July 26, 1787.

The proceedings since Monday last were unanimously referred to the committee of detail; and the Convention then unanimously adjourned till Monday, August 6th, that the committee of detail might have time to prepare and report the Constitution. The whole resolutions, as referred, are as follows:

> "19. *Resolved*, That provisions ought to be made for the Amendment of the Articles of Union, whensoever it shall seem necessary."

> "21. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies, of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon" (p. 378).

Pp. 376-381—Monday, Aug. 6, 1787.

In Convention.—Mr. John Francis Mercer, from Maryland, took his seat.

Mr. RUTLEDGE delivered in the report of the committee of detail, as follows—a printed copy being at the same time furnished to each member:

"We, the people of the states of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare and establish the following Constitution for the government of ourselves and our posterity:" (pp. 376-377).

"Art. XIX.—On the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose" (p. 381).

"Art. XXI.—The ratification of the conventions of • • • states shall be sufficient for organizing this Constitution" (p. 381).

"Art. XXII.—This Constitution shall be laid before the United States in Congress assembled, for their approbation, and it is the opinion of this Convention, that it should be afterwards submitted to a convention chosen in each state, under the recommendation of its legislature, in order to receive the ratification of such convention" (p. 381).

"Art. XXIII.—To introduce this government, it is the opinion of this Convention that each assenting convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the conventions of • • • states, should appoint and publish a day, as early as may be, and appoint a place of commencing proceedings under this Constitution; that after such publication the legislatures of the several states should elect members of the Senate and direct the election of members of the House of Representatives; and that the members of the legislature should meet at the time and

place assigned by Congress, and should as soon as may be after their meeting, choose the President of the United States, and proceed to execute this Constitution."

P. 498—Thursday, Aug. 30, 1787.

Article 19 was then taken up.

Mr. GOUVERNEUR MORRIS suggested that the legislature should be left at liberty to call a convention whenever they pleased.

The article was agreed to *nem. con.* (p. 498).

Article 21 being then taken up:

"The ratifications of the conventions of * * * states shall be sufficient for organizing this Constitution; * * *."

Pp. 499-502—Friday, August 31, 1787.

Mr. GOUVERNEUR MORRIS moved to strike out "conventions of the" after "ratifications;" leaving the states to pursue their own modes of ratification.

Mr. CARROLL mentioned the mode of altering the constitution of Maryland pointed out therein, and, that no other mode could be pursued in that state.

Mr. KING thought that striking out "conventions" as the requisite mode was equivalent to giving up the business altogether. Conventions alone, which will avoid all the obstacles from the complicated formation of the legislatures, will succeed; and if not positively required by the plan, its enemies will oppose that mode.

Mr. GOUVERNEUR MORRIS said he meant to facilitate the adoption of the plan by leaving the modes approved by the several state constitutions to be followed.

Mr. MADISON considered it best to require conventions among other reasons for this, that the powers given to the general government, being taken from the state governments, the legislatures would be more disinclined than conventions

composed in part, at least, of other men; and if disinclined, they could devise modes apparently promoting, but really thwarting the ratification. The difficulty in Maryland was no greater than in other states, where no mode of change was pointed out by the constitution, and all officers were under oath to support it. The people were, in fact, the fountain of all power, and by restoring to them all difficulties were gotten over. They could alter constitutions as they pleased. It was a principle in the bills of rights that first principles might be resorted to.

Mr. M'HENRY said that the officers of government in Maryland were under oath to support the mode of alteration prescribed by the constitution.

Mr. GORHAM urged the expediency of "conventions," also Mr. PINCKNEY, for reasons formerly urged on a discussion of this question.

Mr. L. MARTIN insisted on a reference to the state legislatures. He urged the danger of commitions from a resort to the people and to first principles; in which the government might be on one side and the people on the other. He was apprehensive of no such consequences, however, in Maryland, whether the legislature or the people should be appealed to. Both of them would be generally against the constitution. He repeated also the peculiarity in the Maryland constitution.

Mr. KING observed that the constitution of Massachusetts was made unalterable till the year 1790; yet this was no difficulty with him. The state must have contemplated a recurrence to first principles before they sent deputies to this Convention.

Mr. SHERMAN moved to postpone Article 21 and to take up Article 22; on which question—

> Connecticut, Pennsylvania, Delaware, Maryland, Virginia—ay, 5; New Hampshire, Massachusetts, New Jersey, North Carolina, South Carolina, Georgia—no, 6.

On Mr. Gouverneur Morris's motion to strike out "conventions of the," it was negatived.

Connecticut, Pennsylvania, Maryland, Georgia—ay, 4; New Hampshire, Massachusetts, New Jersey, Delaware, Virginia, South Carolina—no, 6 (pp. 493-500).

* * * * * * * *

Article 22 was then taken up, to wit:

"This Constitution shall be laid before the United States, in Congress assembled, for their approbation: and it is the opinion of this Convention that it should be afterwards submitted to a convention chosen in each state, under the recommendation of its legislature, in order to receive the ratification of such convention."

Mr. GOUVERNEUR MORRIS and Mr. PINCKNEY moved to strike out the words "for their approbation."

On this question—

New Hampshire, Connecticut, New Jersey (in the printed Journal, New Jersey, no), Pennsylvania, Delaware, Virginia, North Carolina, South Carolina—ay, 8; Massachusetts, Maryland, Georgia—no, 3.

Mr. GOUVERNEUR MORRIS and Mr. PINCKNEY then moved to amend the article so as to read:

"This Constitution shall be laid before the United States, in Congress assembled; and it is the opinion of this Convention that it should afterwards be submitted to a convention chosen in each state, in order to receive the ratification of such convention; to which end the several legislatures ought to provide for the calling conventions within their respective states as speedily as circumstances will permit."

Mr. GOUVERNEUR MORRIS said his object was to impress in stronger terms the necessity of calling conventions, in order to prevent enemies to the plan from giving it the go-by. When it first appears, with the sanction of this Convention, the people will be favorable to it. By degrees the state officers, and those interested in the state governments, will intrigue, and turn the popular current against it.

Mr. L. MARTIN believed Mr. Morris to be right, that, after a while, the people would be against it, but for a different reason from that alleged. He believed they would not ratify it unless hurried into it by surprise.

Mr. GERRY enlarged on the idea of Mr. L. Martin, in which he concurred; represented the system as full of vices, and dwelt on the impropriety of destroying the existing Confederation, without the unanimous consent of the parties to it.

On the question on Mr. Gouverner Morris's and Mr. Pinckney's motion:

> New Hampshire, Massachusetts, Pennsylvania, Delaware—ay, 4; Connecticut, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia—no, 7.

Mr. GERRY moved to postpone Article 22.

Col. MASON seconded the motion, declaring that he would sooner chop off his right hand than put it to the Constitution as it now stands. He wished to see some points, not yet decided, brought to a decision, before being compelled to give a final opinion on this article. Should these points be improperly settled, his wish would then be to bring the whole subject before another General Convention.

Mr. GOUVERNEUR MORRIS was ready for a postponement. He had long wished for another Convention that will have the firmness to provide a vigorous government which we are afraid to do.

Mr. RANDOLPH stated his idea to be, in case the final form of the Constitution should not permit him to accede to it, that the state conventions should be at liberty to propose amendments, to be submitted to another General Convention, which may reject or incorporate them as may be judged proper.

On the question for postponing:

> New Jersey, Maryland, North Carolina—ay, 3; New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, South Carolina, Georgia—no, 8 (pp. 501-502).

Pp. 530-534—Monday, Sept. 10, 1787.

In Convention.—Mr. GERRY moved to reconsider Article 19, viz.:

> "On the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose."

(See the 6th of August, p. 381.)

This Constitution, he said, is to be paramount to the state constitutions. It follows, hence, from this article, that two-thirds of the states may obtain a convention, a majority of which can bind the Union to innovations that may subvert the state constitutions altogether. He asked whether this was a situation proper to be run into.

Mr. HAMILTON seconded the motion; but, he said, with a different view from Mr. Gerry. He did not object to the consequences stated by Mr. Gerry. There was no greater evil in subjecting the people of the United States to the major voice than the people of a particular state. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The state legislatures will not apply for alterations, but with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case.

Mr. MADISON remarked on the vagueness of the terms, "call a convention for the purpose," as sufficient reason for reconsidering the article. How was a convention to be formed; by what rule decide?—what the force of its acts?

On motion of Mr. GERRY to reconsider:

Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia—ay, 9. New Jersey—no, 1. New Hampshire divided.

Mr. SHERMAN moved to add to the article:

"or the legislature may propose amendments to the several states for their approbation; but no amendments shall be binding until consented to by the several states."

Mr. GERRY seconded the motion.

Mr. WILSON moved to insert "two thirds of" before the words "several states"; on which amendment to the motion of Mr. Sherman:

New Hampshire, Pennsylvania, Delaware, Maryland, Virginia—ay, 5. Massachusetts, Connecticut, New Jersey, North Carolina, South Carolina, Georgia—no, 6.

Mr. WILSON then moved to insert "three fourths of" before "the several states," which was agreed to *nem. con.*

Mr. MADISON moved to postpone the consideration of the amended proposition in order to take up the following:

"The legislature of the United States, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes as part thereof, when the same shall have been ratified by three fourths, at least, of the legislatures of the several states, or by the conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States."

Mr. HAMILTON seconded the motion.

Mr. RUTLEDGE said he never could agree to give power by which the articles relating to slaves might be altered by the states not interested in that property, and prejudiced against

it. In order to obviate this objection these words were added to the proposition.*

"provided that no amendments, which may be made prior to the year 1808, shall in any manner affect the fourth and fifth sections of the seventh article."

The postponement being agreed to,

on the question on the proposition of Mr. Madison and Mr. Hamilton as amended,

Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay. 9. Delaware, no, 1; New Hampshire, divided. [pp. 530-532.]

. . . . . .

Mr. Hamilton then moved to postpone article 21 in order to take up the following, containing the ideas he had above expressed, viz.:

"*Resolved*, That the foregoing plan of a Constitution be transmitted to the United States in Congress assembled, in order that, if the same shall be agreed to by them, it may be communicated to the legislatures of the several states, to the end that they may provide for its final ratification, by referring the same to the consideration of a convention of deputies in each state, to be chosen by the people thereof; and that it be recommended to the said legislatures, in their respective acts for organizing such convention, to declare that, if the said convention shall approve of the said Constitution, such approbation shall be binding and conclusive upon the state; and further, that if the said convention shall be of opinion that the same, upon the assent of any nine states thereto, ought to take effect between the states so assenting, such opinion shall thereupon be also binding upon such a state, and the said Constitution shall take effect between the states assenting thereto."

Mr. GERRY seconded the motion.

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* The printed Journal makes the succeeding proviso as to the fourth and fifth sections of the seventh article, moved by Mr. Rutledge, part of the proposition of Mr. Madison.

Mr. Wilson: This motion being seconded, it is necessary now to speak freely. He expressed in strong terms his disapprobation of the expedient proposed, particularly the suspending the plan of the Convention on the approbation of Congress. He declared it to be worse than folly to rely on the concurrence of the Rhode Island members of Congress in the plan. Maryland had voted, on this floor, for requiring the unanimous assent of the thirteen states to the proposed change in the federal system. New York has not been represented for a long time past in the Convention. Many individual deputies from other states have spoken much against the plan. Under these circumstances can it be safe to make the assent of Congress necessary? After spending four or five months in the laborious and arduous task of forming a government for our country, we are ourselves throwing insuperable obstacles in the way of its success.

Mr. Clymer thought that the mode proposed by Mr. Hamilton would fetter and embarrass Congress as much as the original one, since it equally involved a breach of the Articles of Confederation.

Mr. King concurred with Mr. Clymer. If Congress can accede to one mode, they can to the other. If the approbation of Congress be made necessary, and they should not approve, the state legislatures will not propose the plan to conventions; or if the states themselves are to provide that nine states shall suffice to establish the system, that provision will be omitted, everything will go into confusion, and all our labor be lost.

Mr. Rutledge viewed the matter in the same light with Mr. King.

On the question to postpone, in order to take up Col. Hamilton's motion:

> Connecticut—ay, 1; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia,—no, 10.

A question being then taken on the article 21, it was agreed to unanimously (pp. 533-534).

P. 541—Thursday, Sept. 13, 1787.

Dr. JOHNSON made a further report from the committee of style, &c., of the following resolutions to be substituted for articles 22 and 23:

"*Resolved*, That the preceding Constitution be laid before the United States in Congress assembled; and that it is the opinion of this Convention, that it should afterwards be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled.

Resolved, That it is the opinion of this Convention, that as soon as the conventions of nine states shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the states which shall have ratified the same; and a day on which the electors should assemble to vote for the President; and the time and place for commencing proceedings under this Constitution; that, after such publication, the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to the secretary of the United States in Congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president for the sole purpose of receiving, opening, and counting the votes for President, and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution."

Adjourned.

Pp. 551-553—Saturday, Sept. 15, 1787.

Article 5:

> "The Congress, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of article 1."

Mr. SHERMAN expressed his fears that three-fourths of the states might be brought to do things fatal to particular states; as abolishing them altogether, or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the states importing slaves should be extended so as to provide that no state should be affected in its internal police or deprived of its equality in the Senate.

Col. MASON thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case.

Mr. GOUVERNEUR MORRIS and Mr. GERRY moved to amend the article so as to require a convention on application of two-thirds of the states.

Mr. MADISON did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the states as to call a convention on the like application. He saw no objection, however, against providing for a convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, &c., which in

constitutional regulations ought to be as much as possible avoided.

The motion of GOUVERNEUR MORRIS and Mr. GERRY was agreed to *nem con.*

Mr. SHERMAN moved to strike out of article 5, after "legislatures," the words "three-fourths," and so after the words "conventions," leaving future conventions to act in this matter, like the present convention, according to circumstances.

On this motion:

> Massachusetts, Connecticut, New Jersey—ay, 3; Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia—no, 7; New Hampshire, divided.

Mr. GERRY moved to strike out the words "or by conventions in three-fourths thereof." On which motion:

> Connecticut—ay, 1; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia—no, 10.

Mr. SHERMAN moved, according to his idea above expressed, to annex to the end of the article a further proviso:

> "that no state shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the senate."

Mr. MADISON: Begin with these special provisos, and every state will insist on them, for their boundaries, exports, &c.

On the motion of Mr. Sherman:

> Connecticut, New Jersey, Delaware—ay, 3; New Hampshire; Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia—no, 8.

Mr. SHERMAN then moved to strike out article 5 altogether.

Mr. BREARLY seconded the motion; on which:

> Connecticut, New Jersey—ay, 2; New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North

Carolina, South Carolina, Georgia—no, 8. Delaware divided.

Mr. GOUVERNEUR & MORRIS moved to annex a further proviso

"that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

This motion, being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it, or, on the question, saying no.

Col. MASON, expressing his discontent at the power given to Congress, by a bare majority, to pass navigation acts, which he said would not only enhance the freight (a consequence he did not so much regard), but would enable a few rich merchants in Philadelphia, New York and Boston to monopolize the staples of the Southern States, and reduce their value perhaps fifty per cent., moved a further proviso

"that no law in the nature of a navigation act be passed before the year 1808, without the consent of two-thirds of each branch of the legislature."

On which motion:

Maryland, Virginia, Georgia—ay, 3; New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, South Carolina—no, 7; North Carolina, absent.

* * * * * * *

On the question to agree to the Constitution, as amended, all the states, ay.

The Constitution was then ordered to be engrossed, and the House adjourned (p. 553).

APPENDIX C.

Madison (June 5):

"• • • Mr. M[adison] thought this provision essential. The articles of Confedn. themselves were defective in this respect, resting in many of the States on the Legislative sanction only. Hence in conflicts between acts of the States, and of Congs. especially where the former are of posterior date, and the decision is to be made by State Tribunals, an uncertainty must necessarily prevail, or rather perhaps a certain decision in favor of the State authority. He suggested also that as far as the articles of Union were to be considered as a Treaty only of a particular sort, among the Governments of Independent States, the doctrine might be set up that a breach of any one article, by any of the parties, absolved the other parties from (the whole) obligation. For these (reasons as well as others) he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves" (1 Farrand, 122, 123).

Madison (June 6):

"*the 15th or last resolve, That the amendment which shall be offered to the confederation, ought at a proper time or times after the approbation of congress to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people, to consider and decide thereon, was taken into consideration.*

Mr. Madison endeavored to enforce the necessity of this resolve—because the new national constitution ought to have the highest source of authority, at least paramount to the powers of the respective constitutions of the states—points out the mischiefs that have arisen in the old confederation, which depends upon no higher authority than the confirmation of an ordinary act of a legislature—Instances the law operation of treaties, when contravened by any antecedent acts of a particular state" (1 Farrand, 126-127).

Madison:

"* * * He observed that the plan of Mr. Patson besides omitting a controul over the States as a general defence of the federal prerogatives was particularly defective in two of its provisions. I. Its ratification was not to be by the people at large, but by the *Legislatures*. It could not therefore render the acts of Congs. in pursuance of their powers even legally *paramount* to the Acts of the States" (1 Farrand, 317).

Yates (June 19):

"Mr. Madison: This is an important question—Many persons scruple the powers of the convention. If this remark had any weight, it is equally applicable to the adoption of either plan. The difference of drawing the powers in the one from the people and in the other from the states, does not affect the powers. There are two states in the union where the members of congress are chosen by the people. A new government must be made. Our all is depending on it; and if we have but a clause that the people will adopt, there is then a chance for our preservation. Although all the states have assented to the confederation, an infraction of any one article by one of the states is a dissolution of the whole. This is the doctrine of the civil law on treaties" (1 Farrand, 325, 326).

The Federalist.

Madison (No. XXXIX):

First. In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears, on one hand, that the constitution is to be founded on the *assent and ratification of the people of America, given by deputies elected for the special purpose;* but on the other,

that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state—the authority of the people themselves. The act, therefore, establishing the constitution, will not be a *national*, but a *federal* act.

That it will be a federal, and not a national act, as these terms are understood by the objectors, the act of the people, as forming so many independent states, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the union, nor from that of a *majority* of the states. It must result from the *unanimous* assent of the several states that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority; in the same manner as the majority in each state must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the states, as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each state, in ratifying the constitution, is considered as a sovereign body, independent of all others, and *only to be bound by its own voluntary act. In this relation, then, the new constitution will*, if established, *be federal*, and not a *national* constitution.

* * * * * * * *

In this relation, then, the proposed government cannot be deemed a *national one;* since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.

* * * * * * * *

If we try the constitution by its last relation, to the authority by which amendments are to be made, we find

it neither wholly *national*, or wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal on the other hand, the concurrence of each state in the union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *states*, not by *citizens*, it departs from the *national*, and advances towards the *federal* character. In rendering the concurrence of less than the whole number of states sufficient, it loses again the *federal*, and partakes of the *national* character.

The proposed constitution, therefore, even when tested by the rules laid down by its antagonists, is in strictness, neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national."

Madison (No. XLIII):

"It has been heretofore noted among the defects of the confederation, *that in many of the states, it had received no higher sanction than a mere legislative ratification.* The principle of reciprocality seems to require that its obligation on the other states should be reduced to the same standard. *A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties.*"

Madison (No. XLIX):

"As the people are the only legitimate fountain of power, and it is from them that the constitutional

charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, *not* only whenever it may be necessary to enlarge, diminish, or new-model the powers of government; but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.

Wilson of Pennsylvania said:

> "But I return to my general reasoning. *My position is, sir, that, in this country, the supreme, absolute and uncontrollable power resides in the people at large; they have vested certain proportions of this power in the state governments; but that the fee simple continues, resides and remains with the body of the people*" (2 Elliot's Debates, 457-458).

Debating the adoption of the Constitution in the South Carolina Convention, Mr. Pinckney said:

> "For a people thus situated is a government to be formed * * * a people who have the justest opinion of their civil and religious rights, and who have risked everything in asserting and defending them.
>
> In every government there necessarily exists a power from which there is no appeal, and which, for that reason, may be formed absolute and uncontrollable.
>
> The person or assembly in whom this power resides is called the sovereign or supreme power of the state. *With us, the sovereignty of the Union is in the people*" (4 Elliott's Debates, 328).

The overriding importance of the debates in the State Conventions for purposes of interpretation of the Constitution has been nowhere better stated than by Madison, in the following words, in the House of Representatives:

> "But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as

the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution" (3 Farrand's Records, 374).